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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Recent Developments . . . A Summary

Education

A United States Court of Appeals held that *Alabama* State College students were denied procedural due process when they were expelled from school without notice or a hearing because they had participated in sit-in demonstrations (p. 755).

A report by the Little Rock school board on its administration of the *Arkansas* Pupil Assignment Act was approved by a federal district court (p. 682). Another federal district court approved a plan for the Dollarway school district which provides for assignment, under specified conditions, of first grade students to schools for which the parents express a preference, (p. 679).

A two-part plan providing for immediate transfer to a white school of all *Delaware* Negro children so requesting, and for the proposal to the state legislature of a new school code eliminating racial discrimination was approved by a federal district court (p. 685).

A federal district court approved a plan submitted by the Escambia County, *Florida,* school board providing for notice to parents of students advising them of their right to apply for a transfer under the state Pupil Assignment Act (p. 689). The Palm Beach school board submitted a plan based on continued use of school attendance districts (p. 691).

The *Louisiana* school-closing statute and its local option feature were held unconstitutional by a three-judge federal district court as a denial of equal protection, and as a means to continue segregation in schools already under order to desegregate (p. 694). The Supreme Court denied certiorari (p. 676).

The New Rochelle, *New York,* school board was ordered by the federal courts to permit Negro students in a segregated school to transfer to other schools in the district, without regard to the student's academic achievement (p. 700).

Federal district courts ordered individual Negro students in Chapel Hill (p. 728) and Greensboro (p. 721), *North Carolina,* reassigned to schools they desired to attend. The Durham school board was ordered by a federal district court to formulate definite criteria for considering reassignment applications previously denied (p. 733). The Mecklenburg county school board was upheld by a federal district court in denying reassignment applications by Negro students (p. 722).

Pennsylvania enacted a statute prohibiting discrimination in certain educational institutions (p. 865).

A federal district court ordered three Negro children admitted to Lebanon, *Tennessee,* grade schools and ordered the board to submit a desegregation plan within thirty days (p. 744).

Dallas, *Texas,* schools were ordered by a federal district court to put a grade-a-year desegregation plan into operation (p. 746).

A federal district court deferred ruling upon whether Prince Edward County, *Virginia,* could close its schools, until the state courts could decide the question; but the court invalidated ordinances providing grants-in-aid to students attending private schools, and enjoined approval of state scholarship grants for such students so long as no public schools were in operation in the county (p 749).

Civil Rights

A United States Court of Appeals held that an action to recover damages under the Civil Rights Acts survived the death of the person injured (p. 772).

A complaint alleging infringement of constitutional and civil rights of prison inmates "inflicted for no infraction of any rule" was held by a United States Court of Appeals to state a cause of action and to entitle the plaintiffs to a hearing on the merits (p. 770).

Criminal Law

A *Kentucky* county court, juvenile section, adopted a nine-point code to define conduct which will be regarded as violative of criminal law in future integration demonstrations (p. 782).

Criminal mischief convictions of sit-in participants were upheld by the *Louisiana* Supreme Court against a claim that state action could be found through a concert of action between a business proprietor and the police to preserve a "custom of the state." (p. 794).

The federal courts dismissed the petition for habeas corpus of a "freedom rider" convicted of breach of the peace in a *Mississippi* justice of the peace court, since she had not appealed her conviction to higher state courts (p. 786). A federal district court in *Mississippi* remanded breach of the peace prosecutions of other "freedom riders," after the defendants had sought to remove them from the state courts (p. 780).

The *South Carolina* Supreme Court reversed convictions for "conspiring to breach the peace," on the ground that this charge was too general to defend against (p. 784), but convictions in another case, for staging a parade on city streets without a license, were upheld against defendants' contention that the charge was too vague (p. 798).

Employment

An order by the *Colorado* Anti-Discrimination Commission prohibiting unlawful discrimination in hiring by an interstate airlines was dismissed by a state district court on the ground that the commission lacked jurisdiction because the federal government had pre-empted the field of regulation of interstate air carriers (p. 805).

Fair employment acts were passed in *Illinois* (p. 868) and *Missouri* (p. 874).

A Houston, *Texas*, business proprietor was granted an injunction by a state district court against the picketing of his business for the purpose of coercing a change in his employment practices (p. 821).

A federal district court dismissed an action brought by members of a union's Negro local who alleged that an all-white local was guilty of discrimination in the negotiation and administration of collective bargaining agreements; the dismissal was based on the failure of plaintiffs to show any personal injury to themselves arising from the alleged discriminatory practices (p. 818).

Governmental Facilities

A federal district court refused to order immediate desegregation of the Memphis, *Tennessee*, park facilities after the city had desegregated part of such facilities and had evolved a plan for gradual desegregation, the court finding that defendants had shown additional time to be necessary (p. 828). The restrooms of the Memphis public libraries were ordered desegregated by a federal district court (p. 825).

An injunction against segregation of the spectator seating area of the Petersburg, *Virginia*, municipal court was denied by a federal district court, which found that such action did not violate constitutional rights in the absence of a state law requiring segregated seating (p. 822).

Housing

A *California* municipal court held that the state statute requiring "equal accommodation" in "business establishments" did not cover rental housing managed by the owners, where no services were provided (p. 833).

The main section of the *Colorado* Fair Housing Act was held by a state district court to be unconstitutional for vagueness and as an unlawful delegation of power to an administrative commission (p. 835).

A *Connecticut* county court held that the state fair housing act did not cover a real estate agent who had not erected five or more houses on his parcel of land (p. 841). Since the above complaint was filed, the coverage of the act has been broadened to include building lots (p. 877).

New Hampshire enacted new fair housing provisions (p. 886).

A subpoena issued to an apartment-owning corporation by the *New York* attorney general under his authority to investigate anti-trust violations was vacated by a state supreme court as a "fishing expedition" (p. 845). New York City broadened the coverage of its fair housing law (p. 877).

A *Pennsylvania* regulation forbids inducement of "panic selling" through fear of a decline in value of real estate (p. 902).

Public Accommodations

A federal district court refused to enjoin the city of Jacksonville, *Florida* from selling its golf course while retaining a possibility of reverter if the land should not be used for golfing purposes for twenty-one years, and also refused to enjoin racial discrimination by the new private owners (p. 850).

The "wanton trespass" convictions of one group of individuals who had demonstrated against the segregation policies of an amusement park owner were upheld by the *Maryland* Court of Appeals; but convictions of a second group were reversed, because they were not properly notified to leave (p. 853).

Regulations against discrimination in places of public accommodation were enacted in *New Hampshire* (p. 886), St. Louis, *Missouri* (p. 881), and Wilmington, *Delaware* (p. 885).

Miscellaneous

The federal Interstate Commerce Commission issued a regulation prohibiting racial discrimination in interstate bus terminals (p. 902).

A United States Court of Appeals affirmed a district court's denial of a temporary injunction against the attendance by Birmingham, *Alabama*, policemen of the meetings of an anti-segregation organization (p. 850).

Holding that discrimination was being practiced against Negroes in regard to registration for voting, a federal district court ordered certain Bienville Parish, *Louisiana*, Negroes' names reinstated on the registration rolls, and enjoined the parish registrar from engaging in racial discrimination in the future (p. 802).

The powers of the members of the *Massachusetts* Commission Against Discrimination were increased by statute (p. 863).

A statute broadly prohibiting discrimination in places of public accommodation, in sales, in employment, and in private clubs was enacted by the *Virgin Islands* (p. 859).

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CORRECTION

In the Summary of Recent Developments in the last issue of the Reporter [6 Race Rel. L. Rep. 370 (1961)] under the topic *Transportation*, the name "Birmingham Transit Company" was inadvertently used instead of "Birmingham Terminal Company," the latter being the party which was actually enjoined from maintaining racial segregation signs in waiting rooms. We regret this error, and note that the correct name was used in the summary preceding the opinion in the case of *Baldwin v. Morgan*, 6 Race Rel. L. Rep. 566 (1961).

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

UNITED STATES SUPREME COURT

MISCELLANEOUS ORDERS

The United States Supreme Court

Affirmed, Per Curiam:

Gremillion v. United States (Prior decision 194 F. Supp. 182, 6 Race Rel. L. Rep. 413 [E.D. La. 1961] enjoining the enforcement of two Louisiana criminal statutes prohibiting the influencing of parents to send their children to schools operated in violation of the state's laws). No. 200, October 10, 1961, 30 L.W. 3120. "The motion to affirm is granted and the judgment is affirmed."

Vacated and Remanded, Per Curiam:

National Association for the Advancement of Colored People v. Gallion (Prior decision 290 F. 2d 337, 6 Race Rel. L. Rep. 497 [5th Cir. 1961] affirming a refusal to enjoin an attempt in state court by state officials to prohibit the NAACP from doing business in Alabama). No. 303, October 23, 1961, 30 L.W. 3130. "The petition for a writ of certiorari is granted. The judgment below is vacated, and the case is remanded to the Court of Appeals with instructions to direct the District Court to proceed with the trial of the issues in this action unless within a reasonable time, no later than January 2, 1962, the State of Alabama shall have accorded to petitioner an opportunity to be heard on its motion to dissolve the state restraining order of June 1, 1956, and upon the merits of the action in which such order was issued. Pending the final determination of all proceedings in the state action, the District Court is authorized to retain jurisdiction over the federal action and to take such steps as may appear necessary and appropriate to assure a prompt disposition of all issues involved in, or connected with, the state action. Truax v. Corrigan, 257 U.S. 312, 331-334.

Mr. Justice Stewart took no part in the consideration or decision of this case."

Dismissed on Appeal:

Tinsley v. City of Richmond (Prior decision 119 S.E. 2d 488 [Va. Sup. Ct. App. 1961] affirming the loitering conviction of a person who was standing in front of a department store during a picketing demonstration against it, but was not a demonstrator, and who failed to move on when ordered to do so by the police). No. 315, October 23, 1961, 30 L.W. 3130. "Per Curiam. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

Mr. Justice Douglas is of the opinion that probable jurisdiction should be noted."

Noted Probable Jurisdiction:

Turner v. City of Memphis (Prior decision————F.Supp.————, 6 Race Rel. L. Rep. 233 [W.D. Tenn. 1961] staying an action in the district court to enjoin the segregated operation of the Memphis municipal airport's eating and restroom facilities, pending prosecution of a declaratory judgment suit in state courts for an interpretation of pertinent state statutes and

city ordinances.) No. 84, August 10, 1961, 30 L.W. 3111. "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and the case is transferred to the summary calendar."

Denied Certiorari:

Bailleaux v. Hatfield (Prior decision 290 F.2d 632, 6 Race Rel. L. Rep. 767, *infra* [9th Cir. 1961]). No. 302 Misc., August 10, 1961, 30 L.W. 3114.

East Baton Rouge Parish School Board v. Davis (Prior decision 287 F.2d 380, 6 Race Rel. L. Rep. 81 [5th Cir. 1961] affirming a decision enjoining racial segregation in East Baton Rouge Parish, Louisiana, public schools). No. 226, October 10, 1961, 30 L.W. 3113.

Hammond v. Kirby (Prior decision 345 S.W. 2d 910, 6 Race Rel. L. Rep. 622 [Ark. Sup. Ct. 1961] denying a petition for an immediate trial by accused rapists in Pulaski County, Arkansas, since defendants admitted they would immediately move to quash the jury panel as improperly selected). No. 102 Misc., August 10, 1961, 30 L.W. 3114.

Henslee v. Bailey (Prior decision 287 F.2d 936, 6 Race Rel. L. Rep. 589 [8th Cir. 1961] holding that a convicted rapist had made out a prima facie case of racial discrimination in the selection of Pulaski County, Arkansas, jury panels, and remanding his case for retrial). No. 273, October 10, 1961, 30 L.W. 3121. "The motions of respondents for leave to proceed in forma pauperis are granted. The petitions for writs of certiorari are denied."

Louisiana State Board of Education v. Allen (Prior decision 287 F.2d 32, 6 Race Rel. L. Rep. 81 [5th Cir. 1961] affirming a decision enjoining racial segregation in state trade schools). No. 217, October 10, 1961, 30 L.W. 3113.

St. Helena Parish School Board v. Hall (Prior decision 287 F.2d 376, 6 Race Rel. L. Rep. 83 [5th Cir. 1961] affirming a decision enjoining racial segregation in St. Helena Parish public schools). No. 216, October 10, 1961, 30 L.W. 3113.

Denied Rehearing:

Braunfeld v. Brown (Prior decision 81 S.Ct. 1144, 6 Race Rel. L. Rep. 389 [1961]). No. 67 O.T. 1960, October 10, 1961, 30 L.W. 3115.

Denny v. Bush (Prior decision 81 S. Ct. 1917, 6 Race Rel. L. Rep. 408 [1961]). No. 868 O.T. 1960, October 10, 1961, 30 L.W. 3115.

Other Orders:

Garner v. State of Louisiana; Briscoe v. State of Louisiana; Hoston v. State of Louisiana (Prior decision 6 Race Rel. L. Rep. 168 [La. Dist. Ct. and La. Sup. Ct. 1960] denying certiorari to Negroes convicted of disturbing the peace for refusing to move from Baton Rouge lunch counters upon the proprietor's request). Nos. 26, 27, 28, October 10, 1961, 30 L.W. 3111. "The motion of the Committee on the Bill of Rights of the Association of the Bar of the City of New York for leave to file brief, as amicus curiae, is granted."

Cases Docketed:

Alabama State Board of Education v. Dixon (Prior decision 294 F.2d 150, 6 Race Rel. L. Rep. 755, *infra* [5th Cir. 1961]). No. 485, October 10, 1961, 30 L.W. 3122.

Cherry v. Brazier (Prior decision 293 F.2d 401, 6 Race Rel. L. Rep. 772, *infra* [5th Cir. 1961]). No. 424, September 20, 1961, 30 L.W. 3087.

Griffin v. Maryland (Prior decision————A.2d————, 6 Race Rel. L. Rep. 853, *infra*, [Md. Ct. App. 1961]). No. 287, August 4, 1961, 30 L.W. 3058.

Henry v. Virginia (Prior decision———S.E.2d———[Va. Sup. Ct. App. (1961)] denying certiorari to a sit-in participant convicted of violating the state criminal trespass statute). No. 346, August 23, 1961, 30 L.W. 3064.

Randolph v. Virginia (Prior decision 119 S.E.2d 817, 6 Race Rel. L. Rep. 471 [Va. Sup. Ct. App. 1961] holding that the state trespass statute was not a racial segregation law, that the defendants were not arrested because of race, and that the procuring of arrest warrants was not state action within the Fourteenth Amendment). No. 248, July 22, 1961, 30 L.W. 3040.

New Rochelle Bd. of Ed v. Taylor (Prior decision 294 F.2d 36, 6 Race Rel. L. Rep. 700, *infra*, [2d cir. 1961]). No. 518, October 26, 1961, 30 L.W. 3137.

COURTS

EDUCATION
Public Schools—Arkansas (Dollarway)

Earnestine DOVE, et al. v. Lee PARHAM, et al.

United States District Court, Eastern District, Arkansas, Western Division, May 12, 1961, 194 F.Supp. 112.

SUMMARY: Negro students brought action in federal court against a Jefferson County, Arkansas, school district, seeking an order requiring their admission to a specified school without regard to the state Pupil Assignment Act of 1956 [1 Race Rel. L. Rep. 579, 1077 (1956)], which was in effect when the action was brought, or to the state Pupil Assignment Law of 1959 [4 Race Rel. L. Rep. 747 (1959)], which was in effect when it came to trial. After extensive litigation, the Board submitted a plan for elimination of compulsory racial segregation under the Pupil Assignment Law of 1959, and the plaintiffs filed objections to that plan. [See summary at 5 Race Rel. L. Rep. 989 (1960)]. Subsequently, the Board submitted a plan which provides for assignment of first grade students to the school for which the parents express a preference, if the student can make an average score on certain qualification tests and if there is sufficient room and teaching capacity available in the school to which transfer is sought. Provision is also made for some "lateral transfers" of students in higher grades. The court tentatively approved the plan as "valid and sufficient on its face as a transitional step," but withheld final approval until the Board shows that its administration of the plan is objective and in good faith.

HENLEY, Chief Judge.

This matter is now before the Court on a report filed on November 19, 1960, by the defendants, school directors and officials of Dollarway School District No. 2, Jefferson County, Arkansas, hereinafter called the Board, and a supplemental report filed on March 11, 1961, by means of which reports the Board seeks approval of its plan for the elimination of compulsory racial segregation of the public schools in the Dollarway district over a period of transition.[1] The validity and sufficiency of the plan incorporated in those two reports are challenged by the plaintiffs.

As part of its present plan the Board reiterates its recognition of the binding force of the Brown decisions and of the decisions of the Court of Appeals in this case, and reaffirms its good faith intention to move with all deliberate speed toward the elimination of compulsory segregation in the Dollarway district. The Board proposes to discharge its obligations through the utilization of a permissible period of transition, and through the application in a valid manner of the pupil assignment criteria set up in the Arkansas Pupil Assignment Law, Act 461 of 1959, and in the rules and regulations promulgated by the Board prior to the April 1960 decision of this Court in this case (183 F.Supp. 389).

1. On April 30, 1960, this Court approved a transitional desegregation plan that was submitted by the Board. Dove v. Parham, D.C. Ark., 183 F.Supp. 389. (For a history of the proceeding leading up to the Court's order of April 30, see the Court's opinion of February 19, 1960. Dove v. Parham, D.C. Ark., 181 F.Supp. 504.) The Court of Appeals concluded that the plan lacked specificity and objectivity, reversed this Court's decision, and remanded the case for further proceedings. Dove v. Parham, 8 Cir., 282 F.2d 256. Pursuant to mandate this Court entered an order directing the Board to submit another plan which would meet the requirements of law. The plan incorporated in the Board's report of November 19, 1960, appeared insufficient to the Court after hearing, and the Board, following an informal conference between Court and counsel on both sides, submitted its supplemental report of March 11, 1961.

Obviously, in assigning pupils to particular schools the Board is concerned, on the one hand, with students who have already entered school, and, on the other hand, with students who at the beginning of any school year are enrolling for the first time at the first grade level. With regard to students falling into the former category, the Board in its original plan announced a general policy against "lateral transfers" of students except in exceptional circumstances and set up a rather rigid definition of such circumstances. In its present plan the Board adheres in general to its policy against lateral transfers, but in deference to certain warnings contained in this Court's opinion approving its original plan, the Board states that said policy will not be enforced as rigidly at the lower grade levels as it will be with respect to students in the higher grades.

As to students entering school for the first time at the first grade level, the Board's original plan contained, to quote the Court of Appeals, "some general softening language," but in that Court's view the plan did not "set forth any definitive program or step on the board's part for so effecting desegregation, or hold forth any promise of such a result, as a 'reasonable start' at this level." 282 F.2d at page 260.

The report filed on November 19, 1960, also contained some language indicative of a more liberal or lenient attitude toward the assignment of Negro children to the first grade at Dollarway, and in argument counsel emphasized the fact that the Board had assigned one Negro girl to the Dollarway school for the 1960-61 school year. This Court, however, was unable to find in the November plan a sufficiently affirmative and objective statement of the Board's future intentions with regard to first grade students to justify approval of that plan as a prompt and reasonable start toward the elimination of compulsory segregation.

In its supplemental report the Board states that at the first grade level a pre-school registration will be conducted so as to give every registering student and his or her parents the opportunity to indicate a preference as to the school in the district which they desire the registering student to attend;[2] that all of such students will be given nationally recognized tests, namely the California Short-Form Test of Mental Maturity and the Metropolitan Readiness Test dealing with reading and numbers;[3] and that each student registering for the first grade who scores at least in the average range of such tests under nationally uniform grading will be assigned, subject to certain qualifications to be mentioned, to the school for which a preference is indicated. This means that a Negro child who expresses or for whom there is expressed a preference for attendance at Dollarway will, in general, and subject to qualifications, be assigned to that school. And, as pointed out in an earlier opinion (183 F.Supp. 389), once such a child is so assigned to Dollarway, the Board's policy against lateral transfers will tend to keep him there.

The qualifications to the general rule of assigning to the school of their choice first graders who score at least within the average range on the tests mentioned are that such assignments are to be consistent with available room and teaching capacity, and not "clearly contrary to applicable and nondiscriminatorily applied standards and criteria of the Pupil Assignment Law and the Board's Regulations under and pursuant thereto."

Students who score below the average range on the tests will be assigned initially "to the school at which, in the judgment of the Board they will be afforded the greatest opportunities to develop their educational capacities."

Giving due weight to the arguments against the plan advanced by plaintiffs, the Court is persuaded that the plan is sufficient on its face to meet initial requirements, and that if actually carried out objectively and with a good faith intent to end ultimately the system of segregation which has existed traditionally in the Dollarway district, it will consititue an adequate start toward the elimination of such segregation and will initiate a permissible transition period.[4]

2. There are only two schools in the Dollarway district. Until the admission of the one Negro student in September 1960, the Dollarway school had been used exclusively for the education of white students, whereas the Townsend Park school has always been reserved for the education of Negro students exclusively. Counsel for both sides have recognized throughout these proceedings that from a practical standpoint no white students will express any desire to be assigned to Townsend Park.

3. It may be said parenthetically that among the public schools of Arkansas the administration of such tests to students about to enter school for the first time is neither novel nor unique educational procedure.

4. In reaching this conclusion the Court does not overlook plaintiffs' argument that although the tests mentioned are to be administered to all students alike they are, from a practical standpoint, to be applied as assignment criteria to Negro students only, and that a white child will be assigned to Dollarway regardless of the score he makes on the

An affected school district is permitted during a transition period some freedom of selection in designating the Negro students who are to attend formerly segregated schools, and in that connection they may employ legitimate assignment criteria, and may even give some limited consideration to race. See Dove v. Parham, supra, 282 F.2d at page 262. And the Court feels that the basic intelligence or mental readiness and maturity of Negro students about to enter school at the first grade level is a legitimate and objective basis of selection during the transition period and may permissibly be used by the Board during such period in accomplishing the program which it has initiated.

The Court recognizes, as must the Board, that the latter's announced willingness to assign Negro first grade students to Dollarway on the basis of score made on the pre-school examination is subject to the qualifications which have been mentioned, and that those qualifications may be so employed in practice as to destroy the facial validity of the plan. But, it is obvious that the attaining of an average or better score on the intelligence tests will of itself do much to satisfy a number of the legitimate assignment criteria contained in the statute and the Board's regulations, and it is at least doubtful in assigning a Negro student that some of the criteria contained in the statute and regulations may be employed lawfully.

Actually, in this as in other contexts, the proof of the pudding is in the eating, and while the Court is willing to give tentative approval to the plan as being valid and sufficient on its face as a transitional step, it is not willing to give the plan final approval in advance of seeing what actions the Board in fact will take under it. The law requires not only good faith and objectivity in the conception of the plan, but also good faith and objectivity in operation thereunder.

In the course of its opinion the Court of Appeals noted that one Negro girl was assigned to the Dollarway school for the current school year, and suggested that on remand this Court "may possibly desire to have indication made, in the more definitive expression of program which the board is being required to make, of what scope of opportunity generally was afforded for admission, in relation to such action." 282 F.2d at page 261.

The Court is informed by counsel that all of the Negro students in the Dollarway district who were to enroll at the first grade level during the current term were given an opportunity to apply for assignment to the Dollarway school. Three of such students requested to be so assigned and pressed their applications to conclusion. One of the applicants was admitted. The applications of the other students, one boy and one girl, were denied. The Court is not aware of the grounds upon which the denials were based.

The two students whose applications for assignment to the Dollarway school at the first grade level have the right under the Board's regulations to request a lateral transfer from Townsend Park to Dollarway at the second grade level, and have the right to have their applications if made considered and passed upon by the Board in accordance with law. Should such applications be made, the Board in considering them should bear in mind that the original applications of those two students were denied before the Board had the benefit of the views of the Court of Appeals as to its original plan, and before the Board had determined to use the tests that have been mentioned as an objective basis for the assignment of first graders; and, in the Court's opinion, the Board should take into consideration the scores made by said students on the intelligence tests, if any, that may have been administered to them before they entered school or during the current school term, and should also consider the work that said students have done during their first year. These factors, of course, are to be considered

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test, assuming that he scores well enough to be admitted to school at all, whereas Negro students who score below average will be automatically assigned to Townsend Park. Nor does the Court overlook the fact that if this method of assigning first grade students continues, and if the Board persists in a strict application of its policy against lateral transfers, the end result might be that the student body at Dollarway would be made of white students assigned there initially without regard to their scores on the tests and of Negro students who were assigned to that school only by reason of having scored at least average on the tests, and that the student body at Townsend Park would be made up entirely of Negro students some of whom at least would have been excluded from Dollarway merely because they failed to score within the average range on tests administered before they even entered school, and this situation would exist eventually at all grade levels. Obviously, such an assignment method cannot be viewed as a constitutional permanent solution to the Board's problems, but this does not necessarily mean that the plan is not valid as a "transitional plan," as a substantial step toward an ultimate goal.

along with other appropriate factors and criteria.

Should other Negro students apply for lateral transfers, such applications should be considered in the light of the Board's general policy with regard to such transfers and of such criteria as are applicable to the particular individuals. The Board has stated that its general policy against lateral transfers will be applied more leniently at the lower grade levels, and the Court is willing to presume at this time that said statement has been made in good faith and that it has actual meaning. However, the Court will take this occasion to repeat what it said in its April 1960 opinion (183 F.Supp. at page 393): "* * * if over a period of time * * * substantial numbers of (Negro) students apply for transfers to (Dollarway School) at the lower grade levels, and if none of such applications are granted, or if the number granted is unreasonably low in proportion to the number of applications, the Court might find it hard to believe that unlawful and unreasonable racial discrimination is not being practiced."

The Court is advised that the making of initial assignments for the 1961-62 term will begin the latter part of this month, and should be completed finally, including the completion of all administrative procedures incident to applications for reassignment, by the latter part of June or early July. The defendants will be directed to report on the Court not later than July 15 as to the assignments actually made and the Court will then be in a better position to judge whether the defendants have in fact and in good faith initiated a period of transition which will lead ultimately to the establishment of a non-discriminatory school system.

It is, therefore, considered, ordered, and adjudged that the plan incorporated in the Board's report of November 19, 1960, as supplemented by the report of March 11, 1961, be, and the same hereby is, approved on its face, and that the Board be, and it hereby is, authorized to proceed under it in making assignments for the 1961-62 school year.

It is further ordered, however, that the Board file a written report with this Court not later than July 15, 1961, showing the assignments, if any, of Negro students to the Dollarway school under the plan, and also showing the applications for such assignments, if any, as were made to and denied by the Board. A copy of this report is to be served upon opposing counsel.

Upon the filing and consideration of such report the Court will enter such other and further orders as may appear necessary or proper, and jurisdiction for that purpose and for all other appropriate purposes is retained.

EDUCATION
Public Schools—Arkansas (Little Rock)

William Henry NORWOOD, et al. v. Everett TUCKER, Jr., et al.

United States District Court, Eastern District, Arkansas, Western Division, September 9, 1961, Civil Action No. 3113, _____F.Supp._____.

SUMMARY: This is a further development in the Little Rock, Arkansas, school cases. For earlier litigation, see 1 Race Rel. L. Rep. 851 (1956); 2 Race Rel. L. Rep. 593, 931-65 (1957); 3 Race Rel. L. Rep. 18, 621, 851-91, 1052 (1958); 4 Race Rel. L. Rep. 17, 543 (1959); 5 Race Rel L. Rep. 615 (1960). In March, 1961, the Eighth Circuit Court of Appeals ruled that although the Arkansas Pupil Assignment Act was "facially" valid, the reassignment procedures of the board under that Act had been discriminatory. The district court was ordered to retain jurisdiction to see that the board thereafter objectively applied the Act's standards and criteria in making initial assignments and that the board take affirmative steps to achieve operation on a non-discriminatory basis. 6 Race Rel. L. Rep. 59 (1961).

In September, 1961, the district court reviewed the board's report. All sixth and ninth

grade students in the system had been requested to state preferences for junior or senior high schools. Forty Negro students, out of 116 who so requested, were assigned to predominantly white schools for the first time. Rejecting plaintiffs' contention that discrimination was shown by the small number of requests granted, the court ruled that the board was "making progress" and had not violated the mandate of the court of appeals. Plaintiffs also argued that applications for reassignment of eleventh and twelfth grade Negro students who are in all-Negro schools because of discrimination in initial assignments in prior years could not be denied on the basis of a board policy against lateral transfers, because the initial assignments had been unlawful. The court agreed that these applications would "stand on a different footing" than others, but found that no such applications had been made.

YOUNG, District Judge.

MEMORANDUM DECISION

This is another episode in the Little Rock School Case.

The general questions involved have been litigated repeatedly and it is unnecessary here to set out the history of the case or to summarize the opinions of the various federal courts which have considered it. The last decision, which is controlling here, is that of the Eighth Circuit Court of Appeals, *Norwood v. Tucker*, 287 F.2d. 798. It sites the previous court decisions dealing with the question and gives a brief history of past events leading up to the present.

That opinion held the Arkansas Pupil Assignment Act to be "facially" valid. It also held that the initial assignments and the procedures for reassignments by the Little Rock School Board under the Assignment Act for the school year beginning September 1959 were discriminatory as against the Negro plaintiffs. The opinion stated that the defendant Board and the school administrators were under an injunction which prevented them from impeding, thwarting or frustrating the school board integration plan, with the provision, however, that the plan might be supplemented by a proper application of the Arkansas Pupil Assignment Act. It stated that the defendants were required to take affirmative steps on their own initiative to facilitate and accomplish operation of the school district on a non-discriminatory basis, that the standards and criteria of the Pupil Assignment Act could not be given application to preserve imposed segregation, that the standards and criteria of that law should be applied objectively in the making of initial assignments of students in the Little Rock School System to the end that imposed segregation would be discontinued in the Little Rock schools "as contemplated by the plan of integration", and that the Assignment Law must be applied objectively in processing applications for transfers or reassignments without discrimination based on race or color to the end that imposed segregation would be discontinued in the Little Rock schools "as contemplated by the plan of integration".

The judgment of this court was reversed and remanded with the directions that the district court retain jurisdiction of the cause to the end that the views expressed in that opinion were carried into effect.

On May 31, 1961 this court entered its order based on the mandate of the Eighth Circuit Court of Appeals, which, among other things ordered the defendants to file with the Clerk of the Court not later than July 15, 1961 a report showing the procedures followed in the initial assignments and the transfers or reassignments of all pupils under the Pupil Placement Law.

We are now in the beginning of the 1961 school year.

Sometime before the close of the school year in June 1961 the Board requested preference statements from all students finishing the 6th and 9th grades as to where these students desired to attend school in September 1961. Apparently 84 Negro children of the 6th grade stated a preference to attend previously all-white schools in the 7th grade. Thirty-two Negro students of the 9th grade made application to attend predominately white senior high schools at the 10th grade level. Prior to the close of school, initial assignments were made by the Board and notice of such assignments placed on the report card of each child.

The Board then made its assignments (Negro children) as follows:

In the Senior High Schools: sixteen to the 10th grade, six to the 11th grade and two to the 12th grade, a total in the Senior High Schools of 24. These pupils assigned to the 11th and 12th

grades had attended white schools in the preceding year. In other words, no students who had not previously attended white schools were assigned to the 11th and 12th grades. This was in accordance with the Board's policy against lateral transfers except for extraordinary reasons. The 16 Negro pupils assigned to the 10th grade had not previously attended white schools.

In the Junior High system, the Board assigned 24 Negro pupils to the 7th grade. All of these had previously attended all-Negro schools.

Under the regulations of the Board, after initial assignments pupils have the privilege of filing application with the Board for reassignment. This may be done within ten days after the initial assignment. A hearing before the Board, which must be held within 30 days after filing of the application for reassignment, is scheduled on each application for reassignment; at least seven days' notice must be given to the pupil and his parents of such hearing. Following the hearing the Board grants or denies each application for reassignment and the applicant is notified of the Board's decision. The Board prepares findings and conclusions explaining its action on each application for reassignment and a copy is furnished to the pupil's parents.

The report filed by the Board pursuant to the order of the court reflects that after the initial assignments were made four Negro pupils in the Senior High School system filed applications for reassignment, all to the 10th grade. Twelve filed applications for reassignment in the Junior High System, six to the 7th grade, two to the 8th grade, and four to the 9th grade. All applications for reassignment by Negro pupils were denied except one at the Junior High level, a Negro pupil who after assignment to a predominately white school wished reassignment to one predominately Negro.

After the reassignment procedure was completed, the final result was the assignment of 24 Negroes to the Senior High system, including ten to the 10th grade, and 24 in the Junior High system, all to the 7th grade.

There were no Negroes assigned to the Junior High system prior to this year. In the school year beginning September 1957 there were nine Negroes assigned in the Senior High system. In the year beginning September 1958 the high schools of Little Rock were closed. In the year beginning September 1959, nine Negroes were assigned to the Senior High School System. In the year beginning September 1960, eleven Negroes were assigned to the Senior High School system.

Comparing this year with last year, there are 24 Negro senior high students assigned to predominately white schools contrasted with eleven last year; there will be 24 Negroes in the Junior High School compared with none last year; or a total of 48 in the high school systems this year compared with eleven last year.

Plaintiffs complain that all Negroes entering the 8th, 9th, 11th and 12th grades were assigned to schools which they had attended in previous years. However, this same thing is true of the white children, and I cannot say that the reasons given by the Board against lateral transfers, which are applicable to both races in the absence of exceptional circumstances, result in any violation of Constitutional rights.

Plaintiffs argue that since the Eighth Circuit opinion held that the school assignments made two years ago were discriminatory it follows that the Negro students who are now entering the 11th and 12th grades (other than those whose assignment requests were granted) are in Negro schools because of the discrimination in initial assignments two years ago and that so called "educational principles" against lateral transfers cannot be used to deny Negro students their Constitutional right to escape from a segregated school to which they were unlawfully assigned in the first instance. With this I agree. If Negro pupils had applied for reassignment to the 11th and 12th grades this year I think they would stand on a different footing from those in the Junior High Schools, which schools are in their first year of a transition period and which were not involved in the discriminatory conduct found by the Eighth Circuit in reference to the high school pupils. However, all of the reassignment requests for the Senior High School were for the 9th and 10th grade and none for the two higher grades. If there were any who expressed a preference for those two grades (a fact not reflected by the record), they did not pursue the reassignment procedure required by the administrative regulations of the School Board, and therefore as it now stands there are no Negro pupils who have requested admission to those grades.

As has been noted, of the 84 Negro pupils who applied for admission to the 7th grade, 24 were eventually admitted; and similarly, of the 32 who applied for the 10th grade, 16 were

admitted. Only four Negroes applied for reassignment in the Senior High system and 12 in the Junior High system. On the face of it this does not indicate racial prejudice or bias.

I think it is demonstrated that the Board is making progress, although not as fast as plaintiffs and some others would like. Last year there were eleven Negro children in the formerly white Little Rock schools, this year there will be 48. While this is not a proportionate number it is something more than a token number.

Furthermore, in this school year there will be Negro children in all three of the Senior High years and 24 in the 7th grade. By next year at least each grade of the high schools in Little Rock, except possibly the 9th grade, or five grades out of twelve in the whole school system will contain Negro students.

I think each year must be judged on its own merits. I would expect the Board to make more progress next year and the years to follow. The Little Rock System is going through a transitional period, but it is imperative that there be continual progress in the development of its integration plan.

No complaint has been made here as to the reassignment or lack of one as to any particular pupil. The only objection is that since so few requests for reassignment by Negroes were granted that this proves that the reassignment procedure was not objective. I cannot say this follows, particularly inasmuch as there were only four requests for reassignment by Negroes in the Senior High system and only 12 in the Junior High.

Reasonable men, conscious of their responsibilities and endeavoring to preserve an excellent school system but attempting to guide the district's affairs in a period of transition into a new way of life in a community, will differ in their approaches. It may be that I would have adopted a different method of procedure this year. It may be, and in fact it is likely, that any other group would not have utilized the identical method here employed.

I cannot say, however, that the procedure of the Little Rock School Board for this year violates the mandate of the Eighth Circuit Court of Appeals or the order entered by this court on that mandate.

Plaintiff's motion will be denied.

EDUCATION
Public Schools—Delaware

Mary Ann EVANS, et al., v. Madeline BUCHANAN, et al.

United States District Court, District of Delaware, June 26, 1961, Civil Action No. 1816, June 26, 1961, 195 F.Supp. 321.

SUMMARY: Class actions in federal district court resulted in a judgment directing defendant state and local school officials to present plans for integration and to admit plaintiff Negro school children to specific named schools on a nondiscriminatory basis. *Evans v. Board of Trustees of Clayton School District*, 2 Race Rel. L. Rep. 7 (1956); 2 Race Rel. L. Rep. 301 (1957); *Evans v. Buchanan*, 2 Race Rel. L. Rep. 781 (1957); *aff'd.*, 3 Race Rel. L. Rep. 901 (1958). After extended litigation [see 4 Race Rel. L. Rep. 257, 574 (1959)], the district court approved a grade-by-grade desegregation over a twelve-year period. The Third Circuit Court of Appeals reversed, and ordered the Board to admit the named plaintiffs immediately and to present a plan to the district court by December, 1960, for full integration of all grades in the public schools of Delaware in the fall of 1961. Both orders were made subject to the right of school boards to carry out the customary processing of school children with relation to capabilities, scholastic attainments, and geographical location. *Evans v. Ennis*, 5 Race Rel. L. Rep. 637 (1960).

The district court approved, with minor modifications, a two-part plan submitted by

defendants. One part of the plan provides for the immediate transfer ("subject to the usual processing of the school system") to a white or integrated school, of all Negro school children who register as desiring such transfer. The court approved the registration requirement, over plaintiffs' objections, because the court of appeals had ordered "immediate integration only of those pupils actively seeking it." The Delaware Tution Act was held unconstitutional insofar as it might condition pupil transfers under the plan. The second part of the plan comprised a new school code which would eliminate racial discrimination and which is to be proposed to the Delaware General Assembly. This part was approved as the most orderly process, in spite of plaintiffs' objections that integration was thus conditioned upon state legislative action, the court presuming that the legislature would perform its "duties under the law."

WRIGHT, Chief Judge.

This is a class action instituted by Negro children to compel their admission into public schools of the State of Delaware on a racially nondiscriminatory basis. Summary judgment for plaintiffs was granted by Judge Leahy in 1957. Evans v. Buchanan, 152 F.Supp. 886 (D. Del. 1957). In 1959 a proposed plan of integration submitted by the State Board of Education was approved by Judge Layton with certain modifications. 172 F.Supp. 508, 173 F.Supp. 891. Plaintiffs appealed, and the Court of Appeals found the approved plan "does not effect desegregation 'with all deliberate speed' and is not a 'reasonable start toward full compliance' with the ruling of the Supreme Court in its Brown opinion of May 17, 1954." Evans v. Ennis, 281 F.2d 385, 387 (3 Cir. 1960).

The mandate of the Court of Appeals required that defendants admit the individual, named infant plaintiffs actively seeking integration. It further ordered the members of the State Board of Education of Delaware and the State Superintendent of Public Instruction to submit a plan for approval by this Court providing generally.

> *(A) for the integration at all grades of the public school system at the fall term 1961, and all subsequent school terms, of all Negro school children who desire integration subject to the usual processing of the school system; and*
>
> *(B) for a "wholly integrated" school system, where-by adequate school facilities at all grades will be provided on a racially non-discriminatory basis.*

The mandate of the Court of Appeals envisages two separate but parallel steams flowing concurrently toward the same goal, a "wholly integrated" school system in which all students compelled by law to attend Delaware public schools will receive education on a racially nondiscriminatory basis. Part (A) of the plan must allow Negro students desiring integration to transfer immediately to white or integrated schools as a matter of right subject only to the usual and nondiscriminatory processing of the school system. Part (B), however, looks to the future and must provide for the ingredients of a wholly integrated system. It must further look to the interim period when the number of Negro students desiring integration increases and provide adequate facilities and procedures to accommodate them.

With certain modifications, the plan submitted by defendants is approved as to both aspects.

(A)—Plan of Integration for Students Presently Desiring It.

Part (i) of defendants' proposed plan provides for the registration of Negro students desiring to transfer to white or integrated schools. Plaintiffs have objected to this "special registration" as they term it. Their objection is not well-taken for two reasons. First, defendants have in their brief and at oral argument assured the Court this registration applies to all pupils, white and Negro, entering the first grade or transferring within a school district. Second, because the Court of Appeals has ordered immediate integration only of those pupils actively seeking it, some procedure must be devised so as to determine who they are. Plaintiffs have not suggested any method which would be more satisfactory to them. Part (i), with certain other modifications as to form rather than substance, will be approved.

Part (ii) of defendants' plan provides that such transfers shall be subject to the usual processing of the school system which shall take into account the adequacy of the facilities of the receiving schools and such rules and regulations

as relate to the capabilities of the pupils desiring transfer, their scholastic attainments, and geographical location. Several modifications must be made. First, the Court of Appeals concluded the number of Negro pupils who will presently seek integration will not overtax the educational facilities of the State. In view of this finding, transfers shall not be subject in the first instance to such a test. Nevertheless, the Court is retaining jurisdiction of this cause, and should it appear that the influx is greater in particular instances than was anticipated, the Court will entertain an appropriate motion for temporary relief from its decree. Second it must be made clear that the standard of geographical location relates only to the question of which white or integrated school the pupil desiring transfer shall attend. It may not, for instance, be used by local authorities to deny integration because the pupil seeking it lives nearer to a presently wholly colored school than to white or integrated facilities. This must be made clear in the plan. Third, part (ii) should explicitly provide that the "usual processing" be conducted on a nondiscriminatory basis.

PART (iii) of defendants' plan provides that in districts having both white and Negro schools, attendance areas shall be established on a nondiscriminatory basis. It establishes other procedures not relevant here. While the Court does not disapprove these provisions, it is not appropriate to include such generalized schemes in this plan. Because the Court is retaining juridiction, any school district, or other appropriate body, desiring to establish such attendance areas or other procedures designed to effectuate integration, may appear before this Court at any time and present its plans. Upon approval, the district will then be exempted from the transfer provisions of this Court's decree.

Part (iv) of defendants' plan relates to the so-called Tuition Act, 14 Del. C. Ann. Par. 602 (1960 Cumm. Supp.), which prohibits the transfer of a pupil from one district to another when the sending district has instruction at his grade level. It further conditions permissible transfers on the payment of tuition by the sending district. Because school districts in some instances have been established on a segregated basis and are thus wholly Negro or wholly white, this statute would effectively prohibit or qualify some transfers contemplated by this plan. Part (iv), as submitted by defendants provides in effect the provisions of the Tuition Act shall apply to all transfers under this plan absent an act of the Delaware General Assembly or an order of this Court. The Tuition Act is not discriminatory on its face, for it is applicable to all transfers between districts, whether they be segregated, or integrated. Because of this, it does not violate the 14th Amendment of the United States Constitution, except to the extent it prohibits or conditions effectuation of the plan presently before the Court. But to that extent, and that extent only, it can be of no effect. The plan should so provide.

Part (v) of defendant's plans purports to establish nondiscriminatory rules relating to "migrants." Nothing in the present plan is intended to prohibit nondiscriminatory procedures for the education of so-called migrant children. There is also no authority in this Court to establish or approve such procedures so long as they do not relate to the problem of integration. Because of this, (v) must be excluded.

Part (vi) relates to transportation and will be approved with one modification. It should explicitly state that the transportation for pupils transferred to white or integrated schools pursuant to this plan will be provided on a racially nondiscriminatory basis.

Part (A), therefore, as modified and renumbered, will read as follows:

(A) Commencing with the start of the fall term, 1961, all public school districts in the State of Delaware shall admit all Negro school children who desire desegregation as pupils on a racially nondiscriminatory basis subject to the following rules and regulations.

(i) The State Board of Education will provide for a registration in the State Board Unit Schools for Negro pupils desiring to transfer and enroll in white or integrated schools, which registration shall be conducted by the State Department of Public Instruction each year. In the Special School Districts, a similiar registration will be conducted by the superintendents who shall be charged with the responsibility of securing such information as may be required by the State Board of Education.

(ii) All such transfers shall be allowed subject only to the usual processing of the school system relating to the capabilities of the pupils desiring transfer, their scholastic attainments, and geographical locations, providing nonetheless, that the processing is conducted on a racially nondiscriminatory basis. No pupil desiring to

transfer from a colored school to a white or integrated school shall be denied admission on the grounds that the Negro school is nearer to his place of residence.

(iii) Transportation for students transferred pursuant to this plan shall be provided according to the Rules and Regulations of the State Board of Education and on a racially nondiscriminatory basis.

(iv) To such extent as 14 Del. C. Ann. Sec. 602 (1960 Cumm. Supp.) would prohibit, condition, or otherwise qualify the pupil transfers contemplated under this plan, it is hereby declared violative of the 14th Amendment of the United States Constitution and of no effect.

(B)—Plan Looking Toward a Wholly Integrated School System.

The main element of this aspect of defendants' proposed plan lies in their submission and recommendation of a proposed new school code to the General Assembly of the State of Delaware. The details of the proposed code are not important here, for it suffices to say racial discrimination in public education is eliminated. Nor does the Court find it necessary or proper to dissect and evaluate all aspects of the proposed code. So long as it eliminates all distinction in public education based on race, it satisfies the requirements of the Constitution of the United States.

The principal legal question here is whether at this stage, the mere submission of proposed legislation to the General Assembly satisfies the mandate of the Court of Appeals. Plaintiffs object to this aspect of the plan on the grounds that it conditions total integration upon speculative legislative action. This objection is not well-taken for several reasons.

In its opinion, the Court of Appeals stated it believed the people of Delaware would perform their duties under the law. Such a presumption alone justifies this method as a first step toward the ultimate goal of a wholly integrated school system. Moreover, the present Delaware school system is a crazy quilt pattern of districts and laws governing education. Even aside from the problem of integration, it may well be in need of a legislative overhaul. In any case, the most orderly process of integration, and clearly the one having the least adverse effects upon all students, white and Negro, can be achieved through legislative action. There is no doubt in the Court's mind but that the Delaware General Assembly, acting with the advice of the State Board and State Superintendent, should have the first opportunity to examine and pass upon the many different methods by which the ultimate goal can be achieved.

Plaintiffs are correct, however, in asserting that state legislative action cannot be a prerequisite to the effectuation of the constitutional rights in question. In oral argument, the Attorney General has necessarily agreed with this legal principle. Nevertheless, it cannot be stressed too much that there is nothing in either aspect of the plan herein approved by the Court which is not subject to change should change appear warranted. Indeed, the Court anticipates many modifications will become necessary in the future. But the practicability and effectiveness of any plan can be determined only through experience gained while it is in operation. Indeed, there is probably no legal problem today in which speculation, although at times unavoidable, is of so little value, and actual experience more necessary, than in the one now before the Court. This Court cannot, and will not, presume at this time that the appropriate authorities will fail in their duties. Nor can finalized preparations for a wholly integrated system be outlined until the Court and the parties know fully what practical educational problems, involving facilities, teachers, redistricting and the like, will arise and how the proper authorities, with their years of experience in the field of education, will act to meet them. Part (A) of this plan, as contemplated by the Court, will answer many of these questions and crystallize many of these problems. In many respects, it will serve as the laboratory in which Part (B) will be conceived and reduced to practice. It may also, in some areas, actually result in the ultimate goal of a wholly integrated system.

The plan submitted by defendants, as modified, is approved.

An order should be submitted in conformity with this opinion.

EDUCATION
Public Schools—Florida

Karen Renee AUGUSTUS, a minor, etc., et al. v. The BOARD OF PUBLIC INSTRUCTION OF ESCAMBIA COUNTY, FLORIDA, et al.

United States District Court, Northern District, Florida, Pensacola Division, June 14, 1961, September 8, 1961, Civil Action No. 1064.

SUMMARY: A Negro filed suit to desegregate the schools of Escambia County, Florida, requesting relief against discriminatory assignment of students, and an order directing the county board of instruction to cease assigning teachers, principals and other school personnel on the basis of the race and color of the students attending the school to which the personnel is assigned. The court granted defendants' motion to strike all references to non-student personnel from the complaint, and denied plaintiff's motion for a summary judgment on the complaint and pleadings. 5 Race Rel. L. Rep. 645 (1960). After hearing, the court found that applications for admission and transfer in the county's public schools were acted upon on the basis of the applicant's race and color. It ordered the board to submit a plan whereby plaintiffs and members of the class they represent would be afforded a "reasonable and conscious opportunity" to apply for admission or transfer to "any schools for which they are eligible without regard to their race or color, and to have that choice fairly considered by enrolling authorities." 6 Race Rel. L. Rep. 73 (1960). On June 14, 1961, the board offered a proposal whereby a letter would be mailed to parents of students advising them that they are being afforded "a reasonable and conscious opportunity to apply for admission to any school for which your child is eligible without regard to race. . . ." The letter would further advise that the school administration still has the function of assigning pupils under the criteria specified in the Florida Pupil Assignment Act, (1 Race Rel. L. Rep. 237, 424, 961; 4 Race Rel. L. Rep. 751). A five-day period during spring registration would be allowed for transfer requests. On September, 1961, the court approved the board's plan, with minor modifications, and ordered that it be used beginning with the 1962-63 school year.

BE IT RESOLVED BY THE BOARD OF PUBLIC INSTRUCTION OF ESCAMBIA COUNTY, FLORIDA, AS FOLLOWS:

1. That upon approval by The United States District Court for the Northern District of Florida, on October 1, 1961, or at such other time as may be directed by the court, the following letter shall be mailed by the Superintendent of Public Instruction of Escambia County, Florida, to the parents or guardians of each child who, according to the school records, will attend the public schools of Escambia County, Florida, during the 1961-1962 school term, to-wit:

Dear Parents or Guardians:

This letter is being sent pursuant to Order of the United States District Court for the Northern District of Florida.

In order to facilitate the fall opening of school, we have a procedure known as Spring Registration which takes place during the 4th week of April in 1962. At that time, a Pupil Assignment Card is completed at the school for each pupil enrolled.

While it is the function of the School Administration to recommend assignments, a parent's preference of schools will be fairly considered. You are herewith advised that you are being afforded a reasonable and conscious opportunity to apply for admission to any school for which your child is eligible without regard to race or color and to have that choice fairly considered by the Board of Public Instruction. If you wish to exercise your right of preference, you must go to the school your child is attending at the time of the Spring Registration and sign a Parent School Preference Card during the period from 23rd through 27th of April, 1962.

The Pupil Assignment Law provides for numerous criteria in the individual assignments of pupils, such as attendance areas, transportation facilities, uniform testing, available facilities, scholastic aptitude, and numerous other factors, except race.

Should the School Administration recommend assignment of your child to a school

other than the one you have requested, you will be notified by letter prior to the fall opening of school. In that event you have the right to request, in writing, an appearance before The Board of Public Instruction to have your preference further considered. If such a request for hearing is received, you will be notified of the time and place of the hearing.

Application for Reassignment may be made at any time when a change of residence address or other material change in circumstance arises.

Sincerely,
Superintendent

2. That admissions and transfers of pupils will be made by this Board pursuant to the provisions of the Florida Pupil Assignment Law.

ORDER

On August 17, 1961, pursuant to notice hearing was held at which counsel for the respective parties were present and heard for consideration of plan submitted by the Board of Public Instruction of Escambia County filed June 14, 1961. This plan was submitted in compliance with a previous order of this court dated March 17, 1961. All aspects of the proposed plan have been considered, including all objections to the plan advanced by plaintiffs as embraced by their motion of June 30, 1961.

This Court finds that the proposed plan of the defendant Board of Public Instruction of Escambia County as evidenced by copy of its resolution filed herein on June 14, 1961, meets the requirements, except as hereinafter modified, of the order of this Court dated March 17, 1961, and that such plan assures the plaintiffs and members of the class represented by them a reasonable and conscious opportunity to apply for admission to, or transfer to, any schools for which they are eligible without regard to race or color, and to have that choice fairly considered by enrolling authorities in accordance with the United States Court of Appeals, Fifth Circuit, opinion in *Gibson* v. *Board of Public Instruction, Dade County, Florida,* 272 F. 2d 763. It is, therefore, hereby

ORDERED:

1. That the Board of Public Instruction, Escambia County, Florida; William J. Woodham, Superintendent of Public Instruction of Escambia County, Florida; A. S. Edwards, Chairman of the Board of Public Instruction of Escambia County, Florida; and Peter Gindl, L. D. McArthur, Clyde Harrison, and A. C. Blount, Members of the Board of Public Instruction of Escambia County, Florida, their agents, employees, and successors, in furtherance of the order of this Court dated March 17, 1961, hereinabove referred to, immediately place into effect and operation the plan submitted by said defendants to this Court under date of June 14, 1961, including resolution attached thereto, in all particulars except as modified and provided hereinafter.

2. That said plan shall be made applicable to all of the public schools under the jurisdiction of said defendants, or any of them, including all junior colleges.

3. That letter to parents and guardians referred to in said resolution shall be mailed on or before October 16, 1961, and shall specify in addition the hours of 7:30 A.M. to 6:00 P.M. for the period 23rd through 27th of April 1962 during which parents and guardians may exercise their right of preference.

4. That the parents or guardian of any child denied application under this procedure shall be notified through regular United States mail on or before July 15 of the same year in which application is made of denial of such application.

5. That the admission of children to public schools under the jurisdiction of defendants shall commence at the beginning of the school year 1962-1963 under this plan.

6. Other objections embraced by plaintiffs' motion of June 30, 1961 are denied, the Court having found that the plan submitted by the defendants, and as modified by this order, if duly administered in good faith satisfies in full the requirements of law.

7. This Court retains jurisdiction of this cause for the entry of such further orders as may be indicated.

DONE AND ORDERED in Chambers at Tallahassee this 8th day of September 1961.

EDUCATION
Public Schools—Florida

William M. HOLLAND, Jr., et al. v. THE BOARD OF PUBLIC INSTRUCTION OF PALM BEACH COUNTY, FLORIDA, et al.

United States District Court, Southern District, Florida, Miami Division, May 26, 1961, No. 7161-M-Civil, _____F.Supp._____.

SUMMARY: A Negro child in Palm Beach County, Florida, applied to the county school board under the state "Pupil Assignment Law" (1 Race Rel. L. Rep. 924) for transfer to a different school. The school to which transfer was requested was stated to have physical facilities superior to the school which was then attended, although it was a greater distance from the home of the child. The request for transfer was denied. The child then brought an action in federal district court to require his admission to the school, contending that the denial of his application has been made on the basis of his race. The court dismissed the action, finding that the denial of transfer had been made as an administrative decision based on crowded school conditions and that there was no indication of discrimination on the basis of race. 2 Race Rel. L. Rep. 785 (1957). On appeal, plaintiff charged that the school districts were "gerrymandered" and that the Pupil Assignment Law was being applied discriminatorily so as unconstitutionally to maintain segregation. The Court of Appeals for the Fifth Circuit in reversing and remanding found it unnecessary to consider those specific charges, the record as a whole showing that a completely segregated public school system was being maintained by defendant, supported by "compulsory residential segregation of the races by city ordinance." The court concluded that "no means of any description" could be used to deprive plaintiff of his constitutional rights. 3 Race Rel. L. Rep. 907 (1958).

On remand, the district court ordered the Board to submit a plan to "eliminate, if there exists, discrimination because of color," and to submit a map showing changes in school districts since the *Brown* decision. On June 26, 1961, the Board submitted a "Plan for the Administration and Operation of Palm Beach County Public Schools," which declared that the Board must operate the school system on the basis of school attendance districts, and that any child who lives within a school attendance district must attend the school within the district, regardless of the child's race or the race of the predominant number of children attending the school.

Order for Plan

This cause came on for hearing pursuant to notice, and the Court having first held a pretrial conference between the lawyers for the respective parties, and being advised in the premises, it is

CONSIDERED, ORDERED and ADJUDGED that the defendants shall within thirty days submit to this Court, with a copy to the plaintiffs, a plan modeled and controlled by the *Brown* and subsequent decisions to eliminate, if there exists, discrimination because of color within the districts in accordance with the new policies of the law without affecting the present districts, and that the defendants shall submit with such a plan a map of the present school districts so drawn as to distinguish between districts created subsequent to the *Brown* decision and older districts, so that a hearing may be held as to whether or not there has been any effort on the part of the defendants to jerrymand attendance districts subsequent to the *Brown* decision.

PLAN FOR ADMINISTRATION AND OPERATION OF PALM BEACH COUNTY PUBLIC SCHOOLS

The Board of Public Instruction of Palm Beach County, Florida is under the duty to provide for the enrollment in a public school in Palm Beach County of each child residing in the county who is qualified under the laws of the State of Florida for admission to a public school and who applies for enrollment in or admission to a public school in Palm Beach County. The Board of Public Instruction of Palm Beach

County operates the public schools of the county on the basis of school attendance districts, and the children in this county qualified for admission to the public schools are assigned to or enrolled in the public schools without regard to race, color, creed, or previous condition of servitude.

Historically, the public school system in Palm Beach County was operated for many years through a series of special school districts. These districts, many of which exist today, were created by the residents of the various communities within the county and were wholly financed and supported by the residents in each particular district. The number of schools within the district, the type of school plant, the size of the instructional personnel, and the salaries paid instructional personnel, were determined by each school district on the basis of the willingness of the freeholders in each district to finance that district's school system. This type of public school system, which was common throughout the several counties of the State of Florida, continued until the adoption of the Minimum Foundation Program by the Florida Legislature in 1957. The Minimum Foundation Program provided for the abolishing of individual school districts within the county, for the creation of a single school district, and for the single school district to assume the existing bonded indebtedness of the several school districts within the county.

In the aftermath of World War II, Palm Beach County experienced a great influx of population which has continued during the decade of the 1950's to the present. It became apparent that the available school facilities were wholly inadequate to meet the needs of the citizens of this county, whereupon the Board of Public Instruction of Palm Beach County undertook a program to provide additional school plant facilities by utilizing capital outlay funds provided by the state of Florida. The funds provided by the state were not sufficient to meet the ever increasing needs, and the Board called upon the freeholders of Palm Beach County to determine whether they would be willing to finance the acquisition of additional sites, to construct additional school plants, and to enlarge existing school plants. The freeholders overwhelmingly agreed to obligate themselves for revenue bonds in the amount of $10,900,000. Since 1956 the proceeds from the revenue bonds have been totally expended for capital improvements for the school system of Palm Beach County. In addition, the Board has utilized its full capacity to obtain funds from the State of Florida and county funds for the construction of additional facilities. Since 1950 some $17,000,000 has been spent to expand and improve the public school system in Palm Beach County. The schools in Palm Beach County have been and will be for some time overcrowded and the facilities taxed to their limits. The Board of Public Instruction of Palm Beach County, with the aid of competent research and investigation by the State Department of Education, has provided schools in Palm Beach County where the greatest needs exist, without regard to race, color, creed, or previous condition of servitude.

In order to provide for the orderly and efficient administration of the public school system of Palm Beach County and to provide for the planning, locating, building, equipping and staffing of schools to meet the ever increasing needs of the citizens of Palm Beach County, it has been necessary for the Board of Public Instruction of Palm Beach County to adopt school attendance districts and assign the children residing in those districts, who are qualified under the laws of the State of Florida for admission to a public school, to specific schools within the districts. The boundary line of the school attendance districts have been determined by geographical conditions, natural boundaries, safety factors, density of population, the construction of new schools, the enlargement of existing schools, and other conditions well known to experienced public school administrators. The boundaries of the school attendance districts have not been established or gerrymandered to create or maintain segregated schools in Palm Beach County. Since the *Brown* decision in 1954 the boundaries of the school attendance districts have been established without regard to race, color, creed, or previous condition of servitude. The school attendance districts have been established for the elementary schools in Palm Beach County, and the children residing within a district are assigned to the elementary school within that particular district. Assignments to junior and senior high schools are made on the basis of a "feeder" school system, wherein the children completing the final grade of an elementary school are assigned to a particular junior high school, and upon completing the final grade of a junior high school are assigned to a particular senior high school. The school attendance dis-

tricts, together with the listing "feeder" school districts, are indicated on the map of Palm Beach County, Florida, attached hereto and by reference made a part hereof.

Having established school attendance districts, the Board in order to prevent a breakdown of the educational system and to obtain the greatest benefit for all citizens requires the children living within a particular school attendance district to attend the school within that district. *Any child, regardless of race, color, creed, or previous condition of servitude, who lives within a school attendance district may attend the school within the district, and, in fact, is required to attend the school within that district.* There are only two exceptions to this policy of the Board. First, if a child's parents move to another school attendance district during a school term, the child may complete the term in the district where his parents formerly resided, and transfer to the school within the district to which the parents have moved the following term of school. Second, if a child's parents are going to move to another school attendance district within ninety (90) days of the commencement of a school term, the child may attend the school served by the district to which the parents intend to move from the beginning of the term.

The policy of the Board in requiring the children residing within a school attendance district to attend the school served by that district has been rigidly followed. Since 1956 scores of applications have been submitted to the Board by the parents or guardians of children for transfer to schools serving districts other than the districts in which the children live. These applications have been considered on their individual merits without regard to race, color, creed, or previous condition of servitude, and with very few exceptions these applications have been denied even though there might have been merit to any particular application because of medical, discipline, academic, or other reasons.

The Board recognizes that it is the inalienable right of any citizen to live where he so desires. As a result, there are schools in Palm Beach County which are attended predominantly by white children, or predominantly by colored children. However, *if a white child resides in a school attendance district where the school is predominantly attended by colored children, he must attend the school serving that district, and, conversely, if a colored child lives in a school attendance district which is served by a school which is predominantly attended by white children, he must attend the school in that district.* During the past decade there have been numerous instances where colored children residing in a school attendance district which is served by a school attended predominantly by white children, or where white children residing in a school attendance district where the school serving that district is attended predominantly by colored children, have been required to attend the schools serving their respective districts, without regard to race, color, creed, or previous condition of servitude. Since it is the inalienable right for any citizen to live where he desires, the Board cannot control, nor would it want to control, where the citizens of Palm Beach County reside. Under the Board's policy, however, the citizen's voluntary choice of residence determines the school his children must attend. In the future, as in the past, the Board necessarily must and therefore will operate the public school system of Palm Beach County on the basis of school attendance districts. If colored children live in a school attendance district where the school is predominantly attended by white children, or if a white child lives in a school attendance district where the school is predominantly attended by colored children, he or she will attend the school in that district, without regard to race, color, creed or previous condition of servitude.

Respectfully submitted,
MARSHALL M. CRISER
First National Bank Building
Palm Beach, Florida

EDUCATION
Public Schools—Louisiana

Lawrence HALL, et al. v. ST. HELENA PARISH SCHOOL BOARD, et al.

United States District Court, Eastern District, Louisiana, Baton Rouge Division, August 30, 1961, Civil Action No. 1068, 197 F.Supp. 649.

SUMMARY: Negro children in St. Helena Parish, Louisiana, filed suit in 1951 seeking desegregation of parish schools. In 1960, a federal district court entered a judgment enjoining the defendant school officials from requiring racial segregation "from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed." 5 Race Rel. L. Rep. 654 (1960). After affirmance of the decision by the Court of Appeals for the Fifth Circuit [6 Race Rel. L. Rep. 83 (1961)], action was started in the parish to close the public schools, subject to a referendum, as provided by Act 2 of the second extraordinary session of the 1961 Louisiana legislature (6 Race Rel. L. Rep. 310). Plaintiffs moved the special three-judge federal district court to enjoin the enforcement of the Act. The court refused to grant a preliminary injunction, but the parish officials agreed not to proceed further under the Act pending litigation of its constitutionality. 6 Race Rel. L. Rep. 416 (1961).

The court first viewed the school closing statute in the context of other legislation passed at the same time, and found it to be a part of a package plan to maintain segregated schools. The remainder of the plan was found to include the setting up of "private" schools which would be supervised by the state and local boards of education through their administration of a state grant-in-aid program (Act 258 of 1958, 3 Race Rel. L. Rep. 1062) and through other devices. The state was held to be a "senior, but not silent, partner" in the operation of these private schools; and therefore the continuance of segregation therein was termed a violation of the equal protection clause. The closing statute was therefore struck down as a means to continue segregation in schools already under order to desegregate.

The closing statute's local option feature was also struck down by the court as a denial of equal protection. The court distinguished cases allowing cities to close their swimming pools and parks to avoid desegregation, because the school system is administered and financed on a state-wide basis. Public education was found to be a concern of the state, and the local option provision was held not to change its status, because "the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities." The court granted plaintiffs an injunction restraining the enforcement of the closing statute. On October 9, 1961, the United States Supreme Court denied certiorari.

WISDOM, Circuit Judge, and CHRISTENBERRY and WRIGHT, District Judges.

Undeterred by the failure of its prior efforts, the Louisiana Legislature continues to press its fight for racial segregation in the public schools of the state. Today we consider its current segregation legislation, the keystone of which, the local option law, is under attack in these proceedings.

On May 25, 1960, this court entered its order herein restraining and enjoining the St. Helena Parish School Board and its superintendent from continuing the practice of racial segregation in the public schools under their supervision "after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed." The Court of Appeals affirmed this judgment on February 9, 1961.

On February 9, 1961, the very day of the affirmance of the order of this court, the Governor of the State called the Second Extraordinary Session of the Louisiana Legislature for 1961 into session to act "relative to the education of the school children of the State . . . for the preservation and protection" of state sovereignty. Within a few days of the call, he certified as emergency legislation what became Act 2 of that session, the local option law in suit, as well as related legislation designed to continue racial

segregation in the public schools, in spite of the desegregation order of this court in this case in particular and desegregation orders in general. As is manifest from the legislative history of the statute and an analysis of its provisions as these are related to cognate legislation, the subsurface purpose of Act 2 is to provide a means by which public schools under desegregation orders may be changed to "private" schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools. In addition, as part of the plan, the school board of the parish where the public schools have been "closed" is charged with responsibility for furnishing free lunches, transportation, and grants-in-aid to the children attending the "private" schools.

The statute in suit violates the equal protection clause on two counts. Most immediately, it is a transparent artifice designed to deny the plaintiffs their declared constitutional right to attend desegregated public schools. More generally, the act is assailable because its application in one parish, while the state provides public schools, elsewhere, would unfairly discriminate against the residents of that parish, irrespective of race.

The language of the Supreme Court in Cooper vs. Aaron, 358 US 1, 17, cannot be disregarded: "The constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously,' Smith vs. Texas, 311 US 128, 132." These words tell the Louisiana Legislature, as clearly as language can, that school children may not be denied equal protection of the laws, may not be discriminated against in school admissions, on grounds of race or color. The Louisiana Legislature has confected one "evasive scheme" after another in an effort to achieve this end. This court has held these unconsitiutional in one decision after another affirmed by the Supreme Court. Yet they continue to be enacted into law.

As with the other segregation statutes, in drafting Act 2 the Legislature was at pains to use language disguising its real purpose. All reference to race is eliminated, so that, to the uninitiated, the statute appears completely innocuous. For example, the first section of Act 2 reads:

"In each parish of the state, and in each municipality having a municipally operated school system, the school board shall have authority to suspend or close, by proper resolution, the operation of the public school system in the elementary and secondary grades in said parish or municipality, but no such resolution shall be adopted by any such board until the question of suspending or closing the operation of such public school system in such grades shall have been submitted to the qualified electors of the parish or municipality, as the case may be, at an election conducted in accordance with the general election laws of the state, and the majority of those voting in said election shall have voted in favor of suspending or closing the operation of such public school system."

On its face, this section appears inoffensive. It is only after an analysis of this school closing measure with other sections of the act and related legislation that the purpose, mechanics, and effect of the plan emerge.

Irrespective of the express terms of a statute, particularly in the area of racial discrimination, courts must determine its purpose as well as its substance and effect. "A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act." Miller vs. Milwaukee, 272 U.S. 713, 715. Moreover, "acts generally lawful may become unlawful when done to accomplish an unlawful end." Western Union Tel. Co. vs. Foster, 247 U.S. 105, 114. The defendants argue that we should not probe for the purpose of this legislation, that we should ignore the events which led up to and accompanied its passage, and determine its validity based on its language. But "... we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men."

The sponsors of this legislation, in their public statements, if not in the act itself, have spelled out its real purpose. Administration leaders repeatedly said that the local option bill should not be construed as indicating the state would tolerate even token integration. The law would be used in parishes either having or threatened with desegregation: Orleans, East Baton Rouge and St. Helena. Times-Picayune, Feb. 20, 1961.

The program for the legislative session which adopted Act 2 was worked out by the so-called "Liaison Committee," a committee charged with co-ordinating the administration's segregation strategy. Times-Picayune, Feb. 11, 1961. Rep. Risley Triche, administration floor leader and sponsor of Act 2, told the House of Representative, "(The bill) does not authorize any school system to operate integrated schools. We haven't changed our position one iota. This bill allows the voters to change to a private segregated school system. That's all that it's intended to do. I don't think we want to fall into the trap of authorizing integrated schools by the votes of the people. This bill doesn't allow that and we're not falling into that trap." Times-Picayune, Feb. 18, 1961. The president pro tem to the Senate explained the bill as follows: "As I see it, Louisiana is entering into a new phase in its battle to maintain its segregated school system. The keystone to this new phase is the local option plan we have under consideration." Times-Picayune, Feb. 20, 1961. And segregation leader Rep. Wellborn Jack was even more explicit: "It gives the people an opportunity to help fight to keep the schools segregated. We are the ones who have been speaking for segregation. This is going to give the people in all 64 parishes the right to speak by going to the polls. This is just to recruit more people to keep our schools segregated, and we're going to do it in spite of the federal government, the brainwashers and the Communists." Shreveport Times, Feb. 18, 1961. In short, the legislative leaders announced without equivocation that the purpose of the packaged plan was to keep the state in the business of providing public education on a segregated basis.

The legislative scheme, here once revealed, is disarmingly simple. Section 1 of Act 2 provides a means for "closing" the public schools in a parish. Section 13 of the Act provides that the school board may then "lease, sell, or otherwise dispose of, for cash or on terms of credit, any school site, building or facility not used or needed in the operation of any schools within its jurisdiction, on such terms and conditions and for such consideration as the school board shall prescribe." Of course, to the extent that such conveyances, denominated "sales," are for less than the fair value of the property, they are gifts constituting continuing state aid to "private" schools. Presumably, this sale would be made to educational co-operatives, created pursuant to Act 257 of 1958, which would operate the "private" schools with state money furnished by the grant-in-aid program provided for in Act 3 of the Second Extraordinary Session of 1960.

Under Act 3 of the Second Extraordinary Session of 1960, the parish school boards would continue to supervise the "private" schools, under the state board of education, by administering the grant-in-aid program of tuition grants payable from state and local funds. This act is identical with Act 258 of 1958, which was repealed, except that it omits the earlier explanation that tuition grants are available "where no racially separated public school is provided" and it deletes all other references showing its subsurface purpose. Financial aid is direct from state to school; tuition checks are to be made out by the state jointly to the parent and the school. Under Section 12 of Act 2 in suit, the state would also have the responsibility of furnishing such "private" school children with school lunches and transportation, the cost of which would be borne by the state. The program is to be administered by the state board of education, with the assistance of each local board. In addition, in order to insure tenure for the teachers in the "private" schools, Section 1 of Act 4 of the Second Extraordinary Session of 1961 empowers the educational co-operatives to enter into contracts of employment with teachers for "terms of at least five years, but not more than 10 years." And to protect the salaries of the teachers, school bus drivers, school lunch workers, janitors and other school personnel of the "private" schools, Section 2 of the same Act provides that such salaries shall not be "less than or in excess of any minimum salary schedule or law heretofore adopted by the Legislature to govern the salaries or wages of any school teachers, school bus drivers, school lunch workers, janitors or any other school personnel." Acts 9 and 10 were enacted as emergency legislation on the same day Act 2 became law. Act 9 provides for transfer of funds from the public welfare fund to the education expense grant fund. Act 10 provides for allocation of sales tax revenues to the education fund.

Moreover, to make certain that the "private" schools are not interfered with by persons who would accept desegregated education the Legislature adopted Acts 3 and 5 of the Second Extrarodinary Session of 1961. Act 3 provides mandatory jail sentences and fines for anyone

"bribing" parents to send their children to desegregated schools. It rewards informers who report such action with money collected in fines. Act 5 provides mandatory jail sentences for anyone inducing parents or school employees to violate state law, that is, by "attending a school in violation of any law of this state." This Act also rewards the informers. The Legislature at the same special session, apparently feeling that the St. Helena parish school board as constituted could be trusted to supervise the "private" school program but doubtful about the East Baton Rouge parish school board, subject to the same desegregation order as St. Helena, passed Act 7 providing for the packing of the East Baton Rouge parish school board with appointees of the governor.

This analysis of Act 2 and related legislation makes it clear than when the Legislature integrated Act. 2 with its companion measures, especially the "private" school acts, as part of a single carefully constructed design, constitutionally the design was self-defeating. Of necessity, the scheme requires such extensive state control, financial aid, and active participation that in operating the program the state would still be providing public education. The state might not be doing business at the old stand; but the state would be participating as the senior, and not silent, partner in the same sort of business. The continuance of segregation at the state's public-private schools, therefore, is a violation of the equal protection clause. This would be the case in any parish, should the schools be closed under Act 2. At St. Helena the discrimination would be immediate, obvious, and irreparable. See Appendix A. St. Helena is a poor parish. Its schools receive 97.1 per cent of their operating revenues from the state. We draw a fair inference from the record and facts, of which we may take judicial notice, that it would take extraordinary effort for any accreditable private school to operate in St. Helena without substantial funds and participation from the state. It would be a miracle if a single accreditable private school for Negroes could be established in St. Helena within the foreseeable future. To speak of this law as operating equally is to equate equal protection with the equality Anatole France spoke of: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

This scheme of the Louisiana Legislature to deny school children constitutional rights is not new. It has been tried before, with similar results. In declaring such a scheme unconstitutional, the Eighth Circuit, in Aaron vs. Cooper, 261 F. 2d 97, 106-107, relied heavily on this pronouncement by the Supreme Court: "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Fourteenth Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." Cooper vs. Aaron, supra, 19. The ruling here must be the same.

II

Act 2 runs afoul the equal protection clause in another respect. Though its immediate purpose is undoubtedly to circumvent the mandate of Brown and our desegregation orders, thereby discriminating specifically against Negro school children, inevitably, another effect of the statute is to discriminate geographically against all students, white and colored, in St. Helena or any other community where the school are closed under its provisions.

Applying familiar principles to the admitted facts, that conclusion seems inescapable. Thus, it is clear enough that, absent a reasonable basis for so classifying, a state cannot close the public schools in one area while, at the same time, it maintains schools elsewhere with public funds. And, since Louisiana here offers no justification for closure in St. Helena Parish alone, and no "state of facts reasonably may be conceived to justify it," except only the unlawful purpose to avoid the effect of an outstanding judgment of the court requiring desegregation of the public schools there, it seems obvious that the present classification is invidious, and therefore unconstitutional, even under the generous test of the economic discrimination cases. See McGowan vs. Maryland, 366 US 420, 425-428, and cases there cited. But defendants reject this simple and direct approach, alleging that it ignores what they deem controlling differences in the present legislation. Accordingly, we must examine the question at greater length.

To distinguish the other school closure cases, particular stress is laid on the local option feature of the statutory plan. Much is claimed for it. Indeed, conceding that a legislative or gubernatorial directive closing the public schools in only one parish would be constitutionally invalid, defendants nevertheless maintain that

there is no denial of equal protection when the same result is achieved through a decision of the local authorities rather than the central state government. The argument has two faces. First, it is said that the state legislature itself is guilty of no discrimination, since its statute treats all communities alike and imposes school closure on none. Then, changing the focus to the local scene, the contention is that when the parish school authorities close all their schools, having dealt impartially with everyone within their limited jurisdiction, they cannot be accused of discriminating. And here defendants cite the swimming pool and park cases. See Tonkins vs. City of Greensboro, North Carolina, 4 Cir., 276 F. 2d 890; City of Montgomery, Alabama vs. Gilmore, 5 Cir., 277 F.2d 364.

The St. Helena Parish School Board may not be discriminating geographically when it expends the full measure of its power by closing all schools under its control, but that does not make the rule of Tonkins and Gilmore applicable. Indeed, even if recreation is viewed in the same constitutional light as public education, the rationale of those cases applies only when the facilities sought to be closed are locally owned, financed and administered, and the state itself is not directly concerned in their operation. See City of Montgomery, Alabama vs. Gilmore, supra, 368, n. 4. In such case, only local action is involved, and so long as the closure order is general and affects all residents equally, there is no discrimination at any level. But the same principle does not excuse inequalities in a statewide, centrally financed and administered, system of public institutions.

There can be no doubt about the character of education in Louisiana as a state, and not a local, function. The Louisiana public school system is administered on a statewide basis, financed out of funds collected on a statewide basis, under the control and supervison of public officials exercising statewide authority under the Louisiana constitution and appropriate state legislation. The state supreme court has said so emphatically:

"... Public education is declared by the constitution to be an affair of the state, and it assumes the whole responsibility of public education...." Nelson vs. Mayor, etc., of Town of Homer, 48 La. Ann. 258, 19 So. 271.

Again in Hill vs. DeSoto parish school board, 177 La. 329, 148 So. 248, 250:

"Under article 12 of the constitution, section 1, free public schools are part of the educational system of the state. In section 10 of that article it is provided that 'the Legislature shall provide for the creation and election of parish school boards which shall elect parish superintendents for their respective parishes.' Pursuant to this mandate, the Legislature of 1922, by Act. No. 100 and 17, created a parish school board for each of the parishes of the state and constituted them bodies corporate in law with full power and authority to make rules and regulations for their own government not inconsistent with the rules and regulations of the state board of education. These boards are public corporations and are created for the purpose of administering for the state the public school affairs of their respective parishes. Their functions are purely of a public character. In matters relating to the free public schools of their parishes, they are the governing authorities not only for the parish as a whole, but for each and all such school districts as may be created. They are state agencies, a part of the state government..."

See State vs. City of New Orleans, 42 La. Ann. 92, 7 So. 674, 677; State vs. Barham, 173 La. 488, 137 So. 862, 864; Singelmann vs. Davis, 240 La. 929, 125 So. 2d 414, 417. See also Appendix A.

Despite defendants' argument to the contrary, none of the recent amendments to Article XII of the Louisiana constitution have affected the control of public education by the state. See Acts 747 and 752 of 1954; Act 557 of 1958. Indeed, in its most recent form, that Article still provides a single state system:

"The Legislature shall have full authority to make provisions for the education of the school children of this state and-or for an educational system which shall include all public schools and all institutions of learning operated by state agencies . . ." La. Const., Art. XII, 1.

Public education remains the concern of the central state government, and ultimate control still rests with the State Legislature and the State Department of Education. The best proof of this is in the recent history of the New Orleans schools. See cases cited in Note 4, and State vs. Orleans Parish School Board, La. App., 118 So. 2d 471; Singelmann vs. Davis, supra. See also La. R.S. 17:1-20; La. R.S. 17:151-166; La. R.S. 17:221-232; La. R.S. 17:261-268; La. R.S. 17:335, 349.4; La. R.S. 17:351-395.6; La. R.S. 17:411-430; La. R.S. 17:441-1304. Nor does Act 2, here involved, change the status of the

public school system. Except in the matter of closure, there has been no decentralization; and where closure is ordered under Act 2, the elaborate state-controlled discriminatory scheme, described in Part I hereof, goes into effect. The funds, the supervision, the accreditation, still come from the state. The plain fact is that the state has not even made a pretense of abandoning its control of education to autonomous subdivisions.

In these circumstances, the true focus is not on the doings of any board, but rather on the action of the state government. The discriminatory scheme embodied in Act 2 originated there. It is true that the Legislature has imposed no inequality, but its instrument encourages it, expressly permits it. And that is equally condemned. "* * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." Burton vs. Wilmington Pkg. Auth., 365 U.S. 715, 725. See also Terry vs. Adams, supra, 469 (opinion of Mr. Justice Black). Applying the rule of Brown to geographical discrimination, "All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle." (Emphasis added.) Brown vs. Board of Education, 349 U.S. 294, 298.

The equal protection clause speaks to the state. The United States Constitution recognizes no governing unit except the federal government and the state. A contrary position would allow a state to evade its constitutional responsibility by carve-outs of small units. At least in the area of declared constitutional rights, and specifically with respect to education, the state can no more delegate to its subdivisions a power to discriminate than it can itself directly establish inequalities. When a parish wants to lock its school doors, the state must turn the key. If the rule were otherwise, the great guarantee of the equal protection clause would be meaningless.

The consequence is that the local option device cannot save Act. 2. Nothing in the cases cited by defendants suggest that it can. Indeed, in upholding local option liquor laws in Rippey vs. Texas, 193 U.S. 504, and Lloyd vs. Dollison, 194 U.S. 445, the Court specifically rests its decision not on the local option feature of the challenged legislation but, expressly, on the proposition that the same result would be constitutionally permissable if achieved by direct action of the Legislature, because "The state has absolute power over the subject." 193 U.S. at 510; 194 U.S. at 448-449. The crucial question goes to the substance of the legislation that is being enacted by the local option device. If it violates the equal protection clause or any other constitutional provision, enactment by local opinion will not save it. More recently, the court has emphasized that whenever differences are constitutionally inoffensive, it is immaterial how they come into being, whether by local option or through a classification made at the central legislative level. See Ft. Smith Light Co. vs. Paving Dist., 274 U.S. 387, 391; Salsburg vs. Maryland, 346 U.S. 545, 552-553. In short, whatever inequalities result from the implementation of Act 2 must be attributed directly to the Louisiana Legislature. As defendants themselves concede, whatever may be the rule with regard to the privileges of dispensing alcoholic beverages, the state itself cannot discriminate in the field of education. There is, of course, greater freedom to classify geographically when the state is regulating a private activity than when it is conferring a governmental benefit. When the state provides a benefit, it must do so evenhandedly. "Such an opportiunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms," Brown vs. Board of Education, 347 U.S. 483, 493.

There can be no question about the actual inequality in educational opportunities that will follow closure of the public schools in St. Helena parish, or any other community that invokes the act. Grants-in-aid, no matter how generous, are not an adequate substitute for public schools. See Missouri ex rel. Gaines vs. Canada, 305 U.S. 337. If a private school system could be established in St. Helena under the aegis of the state, there would still be lacking the organizational and administrative advantages, as well as economics, of operating as a member of a state system. There would be a total lack of the accrediation that is automatic in the case of a public school but absent in the case of a private school except when the school has met educational standards over a period of years. Moreover, under the Louisiana plan these subsubsidies would afford entry to segregated schools alone. See James vs. Almond, supra, 337. Compare Allen vs. County School Board of Prince Edward County, S. D. Va.,—F. Supp. — (8-25-61).

Finally, the requirement of a popular refer-

endum on the question of closure adds nothing to the challenged statute. One of the purposes of the Constitution of the United States was to protect minorities from the occasional tyranny of majorities. No plebiscite can legalize an unjust discrimination. "One's right to life, liberty, and property * * * and other fundamental rights may not be submitted to vote; they depend on the outcome on no elections." Board of Education vs. Barnette, 319 U.S. 625, 638. See Boson vs. Rippy, 5 Cir., 285 F. 2d 43, 45.

This is not the moment in history for a state to experiment with ignorance. When it does, it must expect close scruitiny of the experiment. For the reasons stated, we conclude that Act 2 of the Second Extraordinary Sessions of the Louisiana Legislature for 1961 is unconstitutional. The court will prepare a temporary injunction restraining its enforcement.

Signed:

John Minor Wisdom
United States Circuit Judge
Herbert W. Christenberry
United States District Judge
J. Skelly Wright
United States District Judge

New Orleans, Louisiana
August 30, 1961.

* * *

TEMPORARY INJUNCTION

This case came on for hearing on motion of the plaintiffs for temporary injunction, restraining the enforcement of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961.

It being the opinion of this court that all Louisiana statutes which would directly or indirectly require or permit segregation of the races in the public schools are unconstitutional, in particular, the aforesaid Act 2.

It is ordered that the St. Helena Parish School Board and the members thereof, J. H. Meadows, St. Helena parish superintendent of schools, their successors, agents, representatives, attorneys, and all other persons who are acting or may act in concert with them, be, and they are hereby, restrained, enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Act 2 of the Second Extraordinary Session of the Louisiana Legislature for 1961.

It is further ordered that copies of this temporary injunction shall be served forthwith upon each of the defendants named herein.

It is further ordered that the plaintiffs herein file a bond in the amount of One Hundred Dollars ($100.00) as required by rule 65 (c), F.R. Civ. P.

EDUCATION
Public Schools—New York

Leslie TAYLOR, et al. v. BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF CITY OF NEW ROCHELLE, et al.

United States District Court, Southern District, New York, May 31, 1961, 195 F.Supp. 231.
United States Court of Appeals, Second Circuit, August 2, 1961, No. 27055, 294 F.2d 36.
United States Supreme Court, August 30, 1961, _____S.Ct._____.

SUMMARY: New Rochelle, New York, Negro children brought a class action in federal district court against the city board of education and superintendent of schools, contending that the board had created and maintained a racially-segregated elementary school in violation of plaintiffs' Fourteenth Amendment rights. The court found that the board, having created a segregated school, was under a constitutionally-imposed duty to end segregation in good faith with all deliberate speed, which obligation clearly had not been fulfilled. The board was therefore ordered to present by April 14, 1961, a desegregation plan to begin no later than the start of the 1961-62 school year. 6 Race Rel. L. Rep. 90 (1961). On appeal, the Second Circuit Court of Appeals denied a stay of the direction to file a plan, holding that

the trial court had not yet entered a final judgment, which was a necessary condition of appealability. 6 Race Rel. L. Rep. 418 (1961).

Thereafter, the board submitted a plan, under protest, which provided for a system of permissive transfers to other schools in the district, if the transfers would not create overcrowding, and if the transferring pupil's teacher recommended him as "able to perform in an academically satisfactory fashion" for his grade level. The court found that permissive transfers would protect plaintiffs' constitutional rights, as long as there were "no restrictive conditions." While stating that the board's plan should usually have primary consideration, the court held that this board's suggestions as to conditions in its plan were not "entitled to great weight," because of the attitude of the board's members in submitting their plan under protest. The conditions regarding overcrowding were approved, since there were more than enough vacancies in the other schools in the district to accommodate all possible transferees from the predominantly colored school. The condition based on academic achievement, however, was rejected for three reasons: because the constitutional rights of all the Negro pupils, regardless of academic ability, should be protected; because emotional stability factors would be considered; and because no "objective criteria" controlled the administrative discretion. A further restriction that transfers would be granted only on a yearly basis was rejected as too disruptive of the pupil's education.

On appeal, the Second Circuit Court of Appeals affirmed the district court's holding that there had been deliberate racial segregation in the city's schools. The court further approved the district court's plan as "an eminently fair means of grappling with the situation," and a "recognition of the principle of desegregation." A requested stay of the decree was denied. One judge dissented.

The board then petitioned the United States Supreme Court for a stay of the mandate pending a petition for certiorari. This petition was rejected on the grounds that the case did not bring up "any question presenting a reasonable likelihood of satisfying the standards governing review on certiorari," and that the other considerations advanced by the board had already been reviewed and rejected by the court of appeals. The opinions of the district court, the court of appeals, and the Supreme Court are printed below.

District Court Opinion

I. History of the Litigation

IRVING R. KAUFMAN, District Judge.

In an opinion dated January 24, 1961,[1] this Court found that the Board of Education of the City of New Rochelle had intentionally created and maintained the Lincoln Elementary School as a racially segregated school, and had not acted in good faith to implement desegregation as required by the Fourteenth Amendment. It was the Court's position that since the Board was responsible for the segregated condition at the Lincoln School, it owed the community the primary obligation to correct it. The Court thus requested the Board to present a plan for the desegregation of the Lincoln School, on or before April 14, 1961, as an aid to the Court in the formulation of a final decree.

The Board by a vote of 6–3, decided to appeal this decision to the Court of Appeals for the Second Circuit, and on March 7, moved orally before me to stay the order requesting submission of a plan until that appeal had been determined. This motion was denied from the bench.[2] The Board then applied to the Court of Appeals for a stay. After oral argument, the Court of Appeals, sua sponte, questioned its appellate jurisdiction at this posture of the case, and instructed counsel to file briefs with respect to this issue. "Because of the time required for the preparation of such briefs and for the Court's determination of the issue of its juris-

1. This opinion is reported at D.C.S.D.N.Y. 1961, 191 F.Supp. 181.

2. At the same time, the plaintiffs moved for an order directing the defendants immediately to assign the eleven named minor plaintiffs to elementary schools other than the Lincoln School. This motion also was denied from the bench.

diction to hear the appeal at this stage of the proceeding" the Court of Appeals extended the time for the Board to file the desegregation plan until May 3. In an opinion dated April 13, 1961, 2 Cir., 288 F.2d 600, the Court of Appeals concluded that appellate jurisdiction was lacking, and dismissed the appeal as premature.

On May 3, the Board submitted a plan which purported to accord with the Court's opinion and order of January 24. In addition, three members of the Board filed a so-called minority plan which criticized the Board's plan, and contained an independent proposal for desegregation. Objections to the Board's plan were filed by the plaintiffs on May 5. On May 10, a hearing was held to assist the Court in the formulation of its final decree. The evidence adduced at this hearing was primarily directed to a clarification and appraisal of the plan submitted by the Board. On May 15, the Department of Justice was invited to submit a brief amicus curiæ; this brief was filed with the Court on May 24.

II. The Board's Plan

In view of the obligation resting with the Board to provide for the desegregation of the Lincoln School, the plan submitted by it was given primary consideration in the fashioning of the Court's decree, which is appended to this opinion. Indeed, the Supreme Court, in Brown v. Board of Education, 1955, 349 U.S. 294, 301, 75 S.Ct. 753, 756, 99 L.Ed. 1083, instructed the district courts, in connection with the formulation of decrees, to "consider the adequacy of any plans the defendents may propose * * * to effectuate a transition to a racially nondiscriminatory school system." See also Cooper v. Aaron, 1958, 358 U.S. 1, 7, 78 S.Ct. 1401, 3 L.Ed.2d 5.

But it is imperative to clarify the context in which that plan must be evaluated. It must be again emphasized that the segregation at the Lincoln school was not a fortuity; it was deliberately created and maintained by Board conduct. The Court found that the Board of Education had gerrymandered school district lines so as to confine Negroes within the Lincoln district, and had allowed white children living within the district to transfer to other schools. It must always be kept in mind, therefore, that there has been a finding of deliberate denial of rights guaranteed by the Fourteenth Amendment to the Constitution. Thus, it does not come with grace for any member of the Board to speak of giving preferential treatment to those who have been unlawfully confined within the Lincoln School district (see Tr. p. 119);[3] they are entitled to nothing less than "full compliance" with the mandate of Brown v. Board of Education, see 349 U.S. at page 300, 75 S.Ct. at page 756, and complete enjoyment of the constitutional rights which previously have been denied to them. These rights cannot lawfully be so enshrouded with conditions and restrictions as to make a sham of the Court's ruling.

Nor can academic or administrative criteria be applied so as to preserve officially imposed segregation. These factors must of necessity be subordinated to constitutional rights, and cannot be utilized to prevent the vindication of these rights. "An individual cannot be deprived of the enjoyment of a constitutional right, because some governmental organ may believe that it is better for him and for others that he not have this particular enjoyment. The judgment as to that and the effects upon himself therefrom are matters for his own responsibility." Dove v. Parham, 8 Cir., 1960, 282 F.2d 256, 258. It is in light of these factors that I now proceed to a detailed consideration of the Board's plan.

The plan submitted by the Board provides as follows:

"Any pupil attending the Lincoln Elementary School, without regard to race, creed, color or national origin, shall be permitted to register and enroll in any elementary school in the New Rochelle Public School System, under the following conditions:

"(1) There shall be available a seat to accommodate the child in the grade to which he seeks admission.

"(2) Admission of out-of-district pupils shall be made only in conformity with the Board of Education's class size policy.

"(3) Any pupil for whom such transfer is sought shall be recommended by his classroom teacher and principal as being able to perform in academically satisfactory fashion on the grade level to which he is assigned, with the recommendation and request being subject to the approval of the Superintendent of Schools.

"(4) Permission granted for such transfer shall be on a year to year basis, with children actually living within the confines of the receiv-

3. All transcript references herein are to the record of the hearing on May 10, 1961.

ing school district having priority in admission to a given school and seats within the classrooms.

"(5) Any parent requesting such a transfer shall give a written statement expressing his willingness to provide trasportation at his own expense.

"(6) The Board of Education reserves the right of flexibility in the administration of the transfer plan in keeping with the overall administration of the school system, since the Board cannot lawfully surrender its powers and duties conferred by the State Education Law.

"(7) All requests for such transfers shall be received annually in the office of the Superintendent of Schools not later than 1 June, preceding the opening of school in September each year except in 1961, the final date being 15 June, 1961."

The plan essentially provides for a system of permissive transfers, whereby under certain restrictive conditions those children residing within the Lincoln district will have the opportunity to register, at their discretion, in any of the eleven other elementary schools in the City of New Rochelle. According to the testimony given at the hearing by Mr. Merryle Stanley Rukeyser, President of the Board of Education, each child is to have a continuing right to elect to transfer from Lincoln at any point during his elementary education experience.

It is the Court's opinion that in the circumstances of this case a basic system of permissive transfers will, at this time, provided there are no restrictive conditions, afford the Negro children in the Lincoln district the rights guaranteed to them by the Fourteenth Amendment. Since the complained of condition has existed for such a long period, a decree, of course, cannot at this late date completely undo the effects of the prior gerrymandering and transfer of white children from the Lincoln School. But, it will give each Negro child the opportunity to secure an elementary education free from officially created segregation.

It appears from the exhibits submitted at the hearing that there will be approximately 940 seat vacancies in the eleven elementary schools other than Lincoln for the forthcoming 1961-62 school year. (Plaintiffs' Exhibit 4-A.) On the other hand, the prospective enrollment in the Lincoln School for 1961-62 is only approximately 479. A breakdown of these vacancies by grades indicates that there will be more than sufficient vacancies in the eleven other schools to accommodate all transferees from Lincoln, even if every child attending Lincoln should elect to transfer.[4]

Therefore, I find that at this time the device of permissive transfers will afford the Negro children in the Lincoln district their constitutional rights. Of course, a court of equity fashioning a decree cannot divine every possible eventuality which may arise in the future. If the principle of permissive transfers should prove inadequate to assure complete relief, the Court will be available to consider other methods to afford this relief.

There are, however, several restrictive conditions which the Board seeks to impose upon the transfer right, which, in my opinion, would nullify its effectiveness. These conditions, therefore, have been excluded from the Court's decree. They are especially objectionable in light of the attitude which the majority members of the Board have manifested throughout these proceedings. Respect for the law is a hallmark of our society. Yet the majority members of the Board have clearly manifested a continuation of their attitude of arrogance. The language of the "Preamble" which precedes the Board's plan bears this out. In this "Preamble" the Board reiterates its position that no constitutional rights have been violated, and that "all things considered the present plan of operation best serves the interest of New Rochelle." It points out that its plan is being submitted under protest, and that "It is neither the choice of the Board nor is its adoption recommended." This, despite the findings and opinion of this Court rendered on January 24th.

In its amicus brief the Department of Justice aptly summarized the Board's conduct as follows: "In short, the Board simply reargues its case; it does not accept the Court's ruling." (Brief, p. 4.) This attitude has permeated the actions of the majority members of the Board throughout. They have refused to recognize their obligation of compliance with the Court's ruling, and have, rather, molded their conduct in accordance with what *they* believe the law *should* be. They insist that no court should sit in judgment of their acts and that only these six people have the wisdom and knowledge of the law to determine what is proper and right in the circumstances. In this context, it does not

4. This conclusion is indicated by data compiled by the Superintendent of Schools on May 1, 1961.

seem that a plan submitted by a Board which, in advance of its adoption, expressly disavows it, is entitled to great weight in determining the content of the final decree.

The Board's restrictive conditions will now be discussed seriatim, and I will indicate, where appropriate, my reasons for rejecting them.

Conditions (1) and (2) both deal with the problem of overcrowding in the receiving schools. Mr. Rukeyser and Dr. Herbert C. Clish, the Superintendent of Schools, testified at the hearing that the plan's reference to the Board's "class-size policy" was intended to indicate maximum class-size—at present 25 for Kindergarten and 29 for Grades 1-6—rather than "ideal" class-size. Since it is clear that there are more than enough vacancies at each grade level to accommodate all transferees without overcrowding, I see no objection at this time to an application of the educationally sound principle of limiting class sizes, provided, of course, that the limitation is based upon a reasonable maximum figure.

But, it must be remembered that overcrowding of schools and classrooms can never be a justification for continued segregation. Mr. Justice Stewart, then a Circuit Judge, expressed this principle in the case of Clemons v. Board of Education of Hillsboro, Ohio, 6 Cir., 228 F.2d 853, 860, concurring opinion), certiorari denied 1956, 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868: "Overcrowded classrooms, however, are unfortunately not peculiar to Hillsboro, and the avoidance alone of somewhat overcrowded classrooms cannot justify segregation of school children solely because of the color of their skins." See also Borders v. Rippy, 5 Cir., 1957, 247 F.2d 268. Therefore, should overcrowding be used as an excuse for not complying with the Court's decree, the Court will be available at that time to deal with his problem.

Condition (3) requires a pupil seeking transfer to receive the recommendation of his classroom teacher and principal "as being able to perform in academically satisfactory fashion on the grade level to which he is assigned * * *." This recommendation must be approved by the Superintendent of Schools. Testimony at the hearing indicated that emotional stability also is to be considered in this regard.

I find this provision to be plainly contrary to the purport of the Court's opinion of January 24, and to the constitutional principles embodied in the Fourteenth Amendment. See, e. g., Mannings v. Board of Public Instruction of Hillsborough County, 5 Cir., 1960, 277 F.2d 370; Jones v. School Board of City of Alexandria, 4 Cir., 1960, 278 F.2d 72. The Constitution does not provide that only academically superior or emotionally well-adjusted Negroes are to have an opportunity to secure an education free from officially-created segregation; neither does it provide that only those Negroes recommended by school authorities are to have this right. It must be re-emphasized that the Negro children in the Lincoln district are not being given a "privilege"; they are being afforded a constitutional right which has previously been denied them.[5]

There are additional aspects to this provision which give me cause for concern and prompt me to question whether its inclusion in the Board's plan could have been motivated by a desire to discourage transfers. The plan does not contain any specific test by which one can define and clarify the rather ambiguous standard "able to perform in academically satisfactory fashion on the grade level to which he is assigned." Apparently, discretion under this provision is to be unfettered and uncontrolled by any objective criteria. For example, Mr. Charles Romaniello, chairman of the Human Relations Committee of the Board of Education, which committee was responsibile for the formulation of the Board plan, testified at the hearing that emotional adjustment, and ability of a child to "adjust to a change in environment" and "different students around him", would be considered, as well as academic achievement. (Tr. p. 47.) And, with respect to each pupil, this arbitrary discretion is to be lodged in three separate persons: teacher, principal, and Superintendent.

The reason for an achievement requirement in the instant situation has not been made clear to me, particularly since it is not imposed upon any other transferees in the system. Indeed, it is quite puzzling in view of the Board's position, strenuously urged throughout the trial, that the Lincoln School is in no way inferior to the other elementary schools in the city; that the

5. Indeed, to term this right to transfer a "privilege" is highly unrealistic. The Board's "achievement" test is premised to an extent on the assumption that it is difficult for young children to adjust to new surroundings. Thus, those who elect to transfer will do so at what may be great personal cost. It may be more difficult for some to adjust than for others. But here constitutional rights are involved, an the decisions as to whether enjoyment of these rights is worth the cost must be made by the individuals affected, and not by the Board.

quality of education at Lincoln is equal to that provided in the other schools; and that pupil achievement is on a level with that in the other schools. (See also Tr. pp. 143-144.)

It is the Court's conclusion that in the circumstances of this case a requirement with relation to academic achievement and emotional stability cannot and should not be imposed in the granting of transfers. A pupil qualifying for a particular grade in the Lincoln School should conclusively be considered eligible for that grade in any of the receiving schools. Of course, once accepted within a receiving school, the transferee should be subject to whatever requirements or classifications are already being applied to all children in that school.

Condition (4) provides that permission to transfer shall be granted only on a year-to-year basis, with priority being given to children actually living within the confines of the receiving school district. I find this provision to be obnoxious, from both an educational and a legal standpoint. Indeed, to expose young children to such uncertainty and insecurity is to make the exercise of their right to transfer from Lincoln so unattractive and onerous that it is questionable whether many would avail themselves of this right. Once again, the Board appears to be proceeding on the fallacious assumption that it is conferring a revocable "privilege" on the Lincoln School children. There is no room in the Constitution for any concept of inferior citizenship. Negroes tranferring from Lincoln cannot, consonant with the principle of equal protection of the laws, be subject to a burden which is not borne by others in the receiving schools. Indeed, it is admitted by the Board that continuity of schooling is a vital factor in education. Mr. Romaniello, Mr. Rukeyser, and Dr. Clish all conceded at the hearing that it was unsound and undesirable to disrupt a child's education by shuttling him from school to school, or to keep the child continually in a state of uncertainty with respect to what school he will be attending in any given year.

The Board seeks to justify this provision with the argument that in the event of possible overcrowding, those children actually living within the transferee district should not be required to transfer to other schools. However, the matter of overcrowding of schools is one with which educational authorities constantly must deal; under such circumstances, they have met this responsibility by constructing additional classrooms and new facilities, or by utilizing other resourceful methods. This problem, and the Board's responsibility in relation to it, is in no way altered by the fact that a small percentage of children may be transferees from Lincoln; once these children enter a receiving school they must, out of regard for their constitutional rights, be accorded the same status as children residing within the district. In any event, as I have already indicated, the statistics on vacancies submitted at the hearing indicate that this problem is an extremely remote one. I, therefore, conclude that once a child is transferred to a receiving school, he should be afforded the opportunity to remain in that school until his elementary education has been completed.

Condition (5) requires any parent requesting a transfer to submit a written statement expressing willingness to provide transportation at his own expense. Since the Board presently does not provide public transportation for elementary school children, except in the case of handicapped children, it will not be required to furnish transportation in the case of the Lincoln School children. However, the necessity for a written statement has not been made clear to the Court. Since it does not appear than any other parents in the New Rochelle school system are required to submit such a statement, regardless of the distance traveled between home and school, I do not deem it necessary to require this of the parents of Lincoln School tranferees.

Condition (6) reserves to the Board the right of "flexibility" in the administration of the transfer program. But, vague and ambiguous language of this nature is inapposite and indeed dangerous where constitutional rights are being dealt with. It has not been indicated exactly what power the Board is to have under this provision; whatever this power may be, no standards have been included to guide its exercise. The courts have continually reiterated the maxim that constitutional rights cannot be subject to the exercise of arbitrary discretion. See Yick Wo v. Hopkins, 1886, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. Board of Supervisors of Louisiana State University, etc. v. Ludley, 5 Cir., 252 F.2d 372, certiorari denied, 1958, 358 U.S. 819, 79 S.Ct. 31, 3 L.Ed. 2d 61; Davis v. Schnell, D.C.S.D.Ala., 81 F.Supp. 872, affirmed 1949, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093. In Orleans Parish School Board v. Bush, 5 Cir., 242 F.2d 156, 165, certiorari denied 1957, 354 U.S. 921, 77 S.Ct. 1380, 1 L.Ed.2d 1436, the

court held: "Attempts * * * to give any official the power to assign students to schools arbitrarily according to whim or caprice are legally impermissible. * * *"

In the instant case, if, as suggested at the hearing, this provision means merely that the Board may place a transferee within a particular group in a grade on the basis of achievement (i. e., slow, medium or fast learner) after he has been accepted in the receiving school, or that the Board may suggest to the parents of a child seeking transfer that it may be more desirable to transfer to one school rather than another, I know of nothing in the Court's opinion or decree which prevents this. If this is the Board's intention, the provision is unnecessary; if it is intended to mean anything more, it is manifestly improper. In either case, it should not be included.

Finally, condition (7) of the Board's plan requires that all transfer applications be received no later than June 1st of each year, and June 15th of the present year. However, in order to facilitate the parents' election process, and to assure that each child who wishes to transfer will have an opportunity to do so, parents of all children expected to be enrolled in the Lincoln School for the forthcoming year should receive, prior to the date set for application for transfers, information indicating the approximate number of vacancies available for each grade in each of the eleven other elementary schools. In addition, when applying for transfers, each applicant should have an opportunity to indicate a choice of several schools to which transfer is requested, in preferential order. In order to allow sufficient time for this process, the application deadline this year will be extended to June 30.

III. Application for Stay

I deem it appropriate to deal at this point with the defendants' request that I stay my final decree pending a determination of the Board's appeal. They base their plea on the contention that plaintiffs will suffer no substantial injury should they be compelled to attend Lincoln Elementary School for another academic year, but that defendants, and the City of New Rochelle, would suffer irreparable damage should they be required to proceed with desegregation this fall. Neither contention is substantiated by the facts.

The determination of whether to grant a stay rests in the Court's discretion and requires a balancing of the equities of the particular situation. It is incumbent upon the defendants to prove that they will be irreparably injured if a stay is not granted. Cf. Eastern Airlines, Inc. v. C. A. B., 2 Cir., 1958, 261 F.2d 830. In this instance, this Court is being asked to weigh the constitutional rights of the plaintiffs against the administrative convenience of the Board of Education and to rule in favor of the latter. Merely to state the proposition is to reject it.

The Board's contention that plaintiffs will not be injured by being required to attend Lincoln School next year completely ignores the findings of the Supreme Court in Brown v. Board of Education, 1954, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed. 873:

> "To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The Court went on to quote with approval the findings of the lower court in the Kansas case:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of [the] law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." (Brackets in original.)

Thus, each year in attendance at a deliberately segregated school brings further injury to the youngsters affected, and impresses deeper into their consciousness that "feeling of inferiority" the harmful effects of which are immeasurable.

Despite the harm caused by segregated education (and it is noteworthy that during the original trial of the case, even the Board's experts agreed that it is great), the Board now

contends that denial of the stay will work more hardship on plaintiffs than would its grant. The Board argues that should it win its appeal, and should it then decide to revoke all transfers for the following year, this would disrupt the education of the children. It is sufficient to state in reply that since it is plaintiffs' constitutional rights which are involved, it is they who should have the right to weigh the risk and decide whether to take advantage of the transfer privilege in the 1961-62 school year. See Dove v. Parham, 8 Cir., 1960, 282 F.2d 256, 258. Moreover, it ill behooves the Board to voice concern over the harmful effects of successive transfers in light of restrictive condition (4) of its proposed plan which envisages similar disruptions.

Clearly then, grant of the stay would work hardship on the plaintiffs. We must balance against this the alleged hardship to defendant Board. Upon so doing, I find that the difficulties envisaged by the Board are not very serious. The Court has adopted the Board's basic proposal of permissive transfers to any school with seats available. Thus, under the Court's decree, there are no new district lines to be drawn and no new facilities to be created, nor will any children attending any of the other elementary schools in New Rochelle be required to transfer elsewhere. The statistics compiled by the Superintendent of Schools indicate that in September, 1961, there will be almost twice as many seats available in existing classes as there are students enrolled in Lincoln School. Thus, regardless of the number of transfer applicants, the Board will be able to place them all without engaging one new teacher or utilizing one additional classroom.[6] To grant a stay in these circumstances would be to ignore completely the realities of the situation.

Several recent decisions of the Supreme Court indicate that the Court now views with disfavor delays in the implementation of desegregation. In Ennis v. Evans, 1960, 364 U.S. 802, 81 S.Ct. 27, 5 L.Ed.2d 36 and Houston Independent School District v. Ross, 1960, 364 U.S. 803, 81 S.Ct. 27, 5 L.Ed.2d 36, the Court denied stays of desegregation plans far more drastic and far reaching than that in the instant case. In Evans, the District Court had approved a plan submitted by the Delaware Board of Education which called for progressive desegregation of the schools, one grade a year, for twelve years. The Court of Appeals reversed and ordered instant total desegregation to begin that coming school year. Despite the fact that the appellate court had overturned the lower court's finding that the gradual plan proposed was necessary to avoid disruptions of the school system, the Supreme Court denied a stay. In the Houston case, the district court had rejected a plan proposed by the local school authorities and had entered an order embodying its own plan for grade-a-year desegregation to begin that fall. The Court of Appeals affirmed, and stay pending appeal to the Supreme Court was denied by that Court. In Danner v. Holmes, 1960, 364 U.S. 939, 81 S.Ct. 686, the Supreme Court refused to reverse the action of the Chief Judge of the Fifth Circuit who had vacated a stay pending appeal granted by the District Court in a case involving admission of Negro students to the University of Georgia. See also Lucy v. Adams, 1955, 350 U.S. 1, 76 S.Ct. 33, 100 L.Ed. 3.

Seven years have passed since the Supreme Court's historic decision in Brown, and as was stated by the Court in Evans v. Buchanan, D.C.D.Del.1959, 173 F.Supp. 891, 893: "It is time now to get down to the serious business of integration." It is impossible to read extensively the cases in this field without sensing a growing impatience in the courts with proposals that integration plans be subject to any further delays.

In the instant situation, the Board has been considering plans for the desegregation of Lincoln since long prior to 1954, but has continually postponed implementation of any solution to the so-called Lincoln problem. Its request for a stay herein is but another part of this pattern of delay; indeed, the desire to avoid coming to grips with the problem has been manifest throughout these proceedings.

In my opinion of January 24, 1961, I made it clear that desegregation of Lincoln was to begin no later than the start of the 1961-62 school year. The grant of a stay at this juncture undoubtedly would delay desegregation for still another year. Under the circumstances, this would be most inequitable.[7] The application for a stay is denied.

6. Mr. Rukeyser testified at the hearing that the plan of permissive transfers would not cost the taxpayers any additional money. (Tr. p. 112.)

7. Another factor which may be considered in determining whether to grant a stay is the likelihood of success of the appeal. While it would be presump-

The Court wishes to express its gratitude to the Attorney General for having accepted so promptly the Court's invitation to intervene as amicus curiæ. His position on both the Board's plan and the application for a stay, stated clearly and with candor in his brief, has been of considerable assistance to the Court.

The Court's decree, formulated in accordance with the conclusions set forth above, is appended hereto.

Decree

This action having been tried to the Court without a jury, and the Court having rendered its opinion on January 24, 1961, finding that the Board of Education of the City of New Rochelle had deliberately created and maintained the Lincoln School as a racially segregated school; and the Court having held a hearing on May 10 with respect to the decree to be entered herein; and proposed plans for desegregation having been submitted by the majority and minority members of the Board of Education; and a brief amicus curiæ having been submitted by the Attorney General; and the Court having considered the foregoing, the Court hereby formulates its decree as follows:

It is hereby ordered, adjudged and decreed:

(1) Commencing with the 1961-62 school year, any child of elementary school age residing in the Lincoln Elementary School District shall be permitted to register and enroll in any other public elementary school in the New Rochelle Public School System, in accordance with the provisions of this decree.

(2) On or before June 14th of this year (1961) and May 15th of each succeeding year, the Board of Education shall distribute to the parents of all children expected to be enrolled in the Lincoln School for the forthcoming school year transfer application forms which will:

(a) Set forth a list indicating the approximate expected number of vacancies in each grade in each of the other public elementary schools in the city for the forthcoming school year.

(b) Provide an opportunity for the applicant to indicate at least four schools, in preferential order, to which transfer is requested.

(c) Include a notice that parents must provide any necessary transportation at their own expense.

Include a notice that applications for transfer must be received by the official administering the plan no later than June 30th of this year, and June 1st in each succeeding year.

(3) Admission of Lincoln School pupils shall be made only in accordance with the Board's maximum class-size policy, provided that this maximum is not set below its present figure.

(4) The Board is not to impose any standard of academic achievement or emotional adjustment as a requirement for transfers.

(5) Each transferring child shall be assigned to the same grade in the school to which he is transferring as he would have been assigned had he remained at Lincoln.

(6) Each pupil shall be retained in the school to which he has transferred until the completion of his elementary education, unless he becomes a resident of another school district.

(7) The Board is not required to furnish any transportation to pupils transferring in accordance with this decree.

(8) The Court shall retain jurisdiction over this case to assure full compliance with this decree.

Court of Appeals Opinion

CLARK, Circuit Judge:

This is a class action brought by eleven Negro children through their parents, on behalf of all Negro children situated in the Lincoln Elementary School District in New Rochelle, New York. Plaintiffs seek principally a permanent injunction enjoining the defendants, the Board of Education and the Superintendent of Schools of the New Rochelle City School District, from requiring them to be registered in a racially segregated public elementary school and requiring the defendants to register them in a public elementary school that is racially integrated. After an extensive trial the District Court, per Kaufman, *J.*, on January 24, 1961, wrote a detailed opinion, reported in D.C.S.D. N.Y., 191 F. Supp. 181, making findings of fact and conclusions of law supporting the plaintiffs' case and directing the defendant Board to present to the court on or before April 14, 1961,

tuous for this Court to evaluate the merit of the Board's appeal, it is noteworthy that the Department of Justice, in its amicus brief, concluded: "This Court made detailed findings of fact which have ample support in the record. In view of the Brown principle that segregated situations such as this should be dealt with under the guidance of the local federal District Court and in view of the eminent reasonableness of the Court's decision in the light of the record it is not likely that defendants would prevail on appeal." (Brief, p. 15.)

a plan for desegregation to begin no later than the start of the 1961-62 school year. Reference is made to this opinion for a detailed statement of the facts here relevant.

The defendants took an appeal, which this court, by divided vote, dismissed as premature. *Taylor* v. *Board of Education, etc.*, 2 Cir., 288 F. 2d 600. Thereafter proceedings were had below resulting in an opinion (not yet reported) and decree of May 31, 1961, which directed the defendants to allow students in the Lincoln Elementary School (the school here in issue) to transfer to other elementary schools within New Rochelle. To comply with the court's directive the defendants had submitted with reluctance a plan for such transfers under conditions which the court found unduly burdensome. So the court in accepting the plan rejected all conditions—other than those of detail as to the time and manner of application—except two, viz., that parents must provide any necessary transportation at their own expense and that there must be available school space for the transferees. It is from this decree—further details of which are noted hereinafter—that the present appeal is taken.

A major finding of the court below was that the defendant School Board had deliberately created and maintained Lincoln School as a racially segregated school. This crucial finding is, we conclude, supported by the record. Thus, around 1930, an area of several blocks, occupied by whites, was carved out of the Lincoln District and added to the Daniel Webster District, even though this area was adjacent to the Lincoln School and was a relatively long distance from the Webster School. When Negroes later moved into this area it was restored to the Lincoln District. In addition, children from the predominantly white Rochelle Park within the Lincoln District were removed from that district and assigned to the Mayflower School. It also appears that until 1949 the Board allowed white children within the Lincoln District to transfer to other schools, with the result that Lincoln School in 1949 was 100 per cent Negro. The defendants sharply attack the testimonial evidence received on this issue; but the basic facts just recited, which appear incontrovertible, support the finding and leave as the vital problem the later conduct of the Board and its present responsibility for the conditions stimulated prior to 1949.

On January 11, 1949, the Board adopted a policy of refusing further transfers and of admitting new students only to the school of the district in which they reside. This policy of attendance at the school of the district of residence, the "neighborhood school policy" or NSP, had been in existence for some time, but with the amelioration provided by the system of permissive transfers; henceforth it was to be applied with complete rigor. While it did mean that a small number of white children were retained in the district, yet it served to fix the Lincoln School as a segregated one, so that it is now 94 percent Negro. At the same time that the Board settled its policy in 1949, it promised a study of district lines with a view to setting up school districts in terms of the best interests of all the children and of the most complete utilization of the present physical plant; and thereafter it caused several surveys to be made by its own school personnel or others. One of the most complete was that made by a professorial team from Teachers College, Columbia, and the School of Education of New York University, resulting in December 1957 in the Dodson Report, so called from its Director, Professor Dan W. Dodson, a specialist in the field who testified for the plaintiffs below. This report, whose official title was "Racial Imbalance in Public Education in New Rochelle, New York," was a most comprehensive statement of the problem and an admonition to the Board to make a broadly based attack upon the evil of segregation, with specific recommendations more extensive and drastic than those in the decree under appeal. See D.C.S.D.N.Y., 191 F. Supp. 181, 188-190.

Major recommendations of the Dodson Report included proposals for the rebuilding of a larger Lincoln School on the same site, with the discontinuance of nearby Washington School, together with extensive redistricting and a more flexible use of NSP in the future. But the Board took no action other than to propose rebuilding the Lincoln School on its present site, which in the light of the Board's policy of refusal to allow children to transfer to schools in other districts would mean a freezing in of segregation at Lincoln. The proposal, once defeated, was, however, eventually carried by referendum vote of the New Rochelle voters in May 1960; and the imminence of plans for the rebuilding of Lincoln precipitated this class action instituted in October and brought to trial in November 1960.

It must be acknowledged that the problems facing the Board, while not peculiar to this community, are serious and difficult. They arise when people of a single racial group tend to settle in a particular neighborhood such as the Lincoln District here, and the trend is accelerated by housing developments and real estate transactions increasing the group numbers. Even so, the action of public bodies, of which school boards are most potent because of the importance of public education in American life, must be in accordance with the constitutional standards as expounded by the Supreme Court.[1] The facts recited above showing the Board's acceleration of segregation at Lincoln up to 1949 and its actions since then amounting only to a perpetuation and a freezing in of this condition negate the argument that the present situation in Lincoln School is only the "chance" or "inevitable" result of applying a neighborhood school policy to a community where residential patterns show a racial imbalance. Rather they make it appear that the Board considered Lincoln as the "Negro" school and that district lines were drawn and retained so as to perpetuate this condition. In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school. This conduct clearly violates the Fourteenth Amendment and the Supreme Court decision in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 38 A. L. R. 2d 1180. See *Clemons* v. *Board of Education of Hillsboro, Ohio*, 6 Cir., 228 F.2d 853, certiorari denied *Board of Education of Hillsboro, Ohio* v. *Clemons*, 350 U.S. 1006; *Holland* v. *Board of Public Instruction of Palm Beach County, Fla.*, 5 Cir., 258 F.2d 730.

So the present 94 per cent Negro enrollment at the Lincoln School goes beyond mere "racial imbalance," and approximates closely the harmful conditions condemned in the *Brown* case. Since these conditions were the result of the deliberate conduct of the Board, the plaintiffs and those similarly situated are entitled to some form of relief.[2]

The plan which the court eventually adopted is one noteworthy for its moderation. It is not one supported by the Dodson Report, but it appears to have been followed with at least fair success in other cities such as Baltimore. It can be put into operation with little administrative difficulty or public expense, as the Board showed in the submission of its own plan, which is the actual basis of the decree finally entered. Under this decree, students who would normally enroll at Lincoln School may apply for transfer to other elementary schools in New Rochelle. They may list at least four choices in order of preference, and are entitled to transfer to the same grade as they would attend at Lincoln, without any necessity of emotional or academic testing or approval. The parents of the students who elect to transfer are obligated to furnish transportation at their own expense; and the right to transfer is subject to the existence of room in the other schools, within the limits of the Board's present policy of maximum class size. We think this plan an eminently fair means of grappling with the situation, in accord with the principle stated in the *Brown* case. Doubtless it will not solve all problems, but it does call for a sincere attempt at recognition of the principle of desegregation in this community. The court's retention of jurisdiction to assure full compliance with the decree gives it also power to make or consider modifications as the need therefor may appear.

The decree must therefore be affirmed. On remand the district court, in view of the delay, will undoubtedly wish to set a later date for applications for transfer for the current school year. We see no occasion to grant a stay of the decree; the Board is called upon for no new public expenditures and will suffer no loss, while the school children will be prejudiced by what will soon be necessarily a year's delay at this crucial period in their education.[3]

Decree affirmed.

DISSENT

MOORE, Circuit Judge (dissenting):

I cannot agree with the opinion of the trial

1. The Board makes much of a decision in its favor in an adversary proceeding brought by these plaintiffs before the State Commissioner of Education. But from the terms of the decision we are forced to conclude that that official did not feel himself subject to the constitutional constraint to the same extent as we do.
2. Under the circumstances we need not examine the interesting issue how far a public body may save itself from constitutional constraint by mere inaction.
3. The petition to intervene presented by Seth M. Glickenhaus *et al.*, the three minority and dissenting members of the nine-member Board, is denied, since the point they wish to make, that the appeal here was not authorized by official Board action, appears not to be well taken. Of course their general stand in favor of more affirmative action against school segregation accords with the decision here and in the court below.

court or that of my colleagues. The defendants have lost and, absent some further review, they and the school children of New Rochelle must conform to the views of a Federal court. However, beneath a banner emblazoned with the words "constitutional rights" and "segregation," is a decision which in its far-reaching implications, in my opinion, may seriously affect the school systems of this country. Our future is closely linked to our educational program. But more closely connected with our heritage are such concepts as individual freedom, democratic elective processes, States' rights and equal protection of our laws for all. Too easy is it to march behind a banner bearing such slogans. History records that the populace, singing and cheering, once marched behind a certain gigantic horse of wood. It seemed harmless enough at the time. History has a way of repeating itself. Would that my Cassandra-like pessimism may prove to be ill-founded. It is doubtful in any event that her warnings ever saved anyone or any nation. I do not claim to have the answer to the problem of racial imbalance throughout the world or even the school problem in New Rochelle. I merely would venture the thought that there may be many different answers and solutions, possibly many unsolvable cases and that these problems should be left to the judgment and discretion of the communities involved, provided, of course, that such judgment be exercised without discrimination in civil rights because of race, color, creed or religion.

Eleven Negro children by their parents in late 1960 filed their complaint (on their own behalf and on behalf of all other Negro children similarly situated) against The Board of Education of The City School District of the City of New Rochelle (the Board) and Herbert C. Clish, as Superintendent of Schools of The City School District of the City of New Rochelle (the Superintendent), as defendants. They allege that the proceeding is "for a permanent injunction enjoining the Defendants from requiring the Plaintiffs to be registered in a racially segregated public elementary school" and affirmatively "requiring them to register the said Plaintiffs in a public elementary school that is racially integrated." The relief sought is that the Court enter a decree:

A. Declaring the application and continuation of the "neighborhood school" policy in New Rochelle to be illegal and unconstitutional and a violation of the due process and equal protection clauses of the Fourteenth Amendment; [1]

B. Enjoining defendants from requiring plaintiffs and others of their class to attend a racially segregated public elementary school;

C. Requiring defendants to register plaintiffs and others in a racially integrated school; and

D. Enjoining defendants from constructing a school in a location that will render it racially segregated "if the Defendants continue to operate the public schools in the City of New Rochelle on a 'neighborhood school' policy."

Despite a modern tendency to regard pleadings as old-fashioned—and hence of little value—only by such allegations can the issues be ascertained and defendants advised of the charges against them (parenthetically, also a constitutional right). The complaint is broad in its sociological concepts. It recognizes that "in many cities of New York State, and elsewhere, ghettos exist." Into these ghettos minority racial groups are crowded. "As a result thereof, the public schools in such neighborhoods in such cities are segregated, reflecting the segregated pattern of the neighborhood." The conclusion is reached that "so long as the Defendants adhere to this 'neighborhood school' policy in the City of New Rochelle, segregated schools will exist there."

Reading some of the more specific charges, the complaint alleges that:

1. there are public elementary schools in New Rochelle "attended only by white children";

2. there is a school "attended only by Negro children";

3. the educational background of the teachers in the allegedly segregated school is inferior;

4. the curriculum in the allegedly segregated school is inferior to the allegedly all-white school;

5. the operation of a "neighborhood school" policy and defendants' refusal to cease such operation violates the rights of plaintiffs and others under the Fourteenth Amendment.

A trial ensued. Over 2,000 pages of testimony were taken, scores of exhibits were introduced. The history of the school problems before the Boards of Education, the city fathers and the people of New Rochelle from 1930 on was put upon the record after a fashion by school board members, past and present, school principals,

1. United States Constitution, Fourteenth Amendment, Section 1.

P.T.A. members, "experts" in the field of education, by reports from the experts which usually, as might be expected, differed radically each from the other, protagonists for one side or the other and the customary amount of hearsay, opinion and speculation always attendant to the task of solving the unsolvable. Conclusions, the "hall mark" of experts' opinions, ranged from "In large measure the problem is not one of race relation, but of differences in socio-economic status of one segment of the community as compared with the other" to "No presently known techniques can now create complete integration of the Lincoln School district, one of these three, and still retain educational values." Various witnesses gave their views as to what constituted segregated schools in their own minds. The percentages sufficient to so characterize a school varied from 50% to 80%.

The best account of the problems presented to the Board during the last ten years (1950-1960) is found in the testimony of Kenneth B. Low who from 1950 to 1960 served on the Board and was its President from 1958 to 1960. He had had a distinguished career in the field of interracial relations and for seven years had served as Chairman of the Westchester County Council appointed by the State Commission Against Discrimination. In answer to the trial court's suggestion that there might be "some solution by changing the district line," namely, by cutting "into Mayflower and Webster and Washington," he points out that the "Dodson" recommendation would result in a 71% Negro student population. This the court thought would be "a step in the right direction"; Mr. Low was of the belief that it would be "a start in the wrong direction." "Solutions," he said, which sent "youngsters out of the district because of their race," as discussed before the Board, brought about "discrimination in reverse because you are creating special conditions for people on account of their race and that it could and perhaps should apply equally to other schools which had either a racial imbalance or a religious imbalance or an imbalance of national backgrounds, and the result is that it would establish a precedent for sending children, because of any of these factors, to schools, which was believed to be a violation of basic principle." (One school was over 90% Jewish and one over 90% Italian.) "But [said Mr. Low] I am not going to violate what I consider to be basic constitutional principles, and the mere fact that this [Lincoln] happens to be a badly imbalanced racial school is not due to any act of the Board of Education. It is a residential condition."

The Issues

The relief sought was a permanent injunction. Of necessity an injunction must operate presently and prospectively. It should be granted or denied in the light of existing conditions and not upon practices or regulations no longer in effect.[2] Yet vast amounts of testimony were taken concerning the situation from 1930 to 1949 and from 1949 to 1960.

Quite apart from the conflict in the opinions of various witnesses, certain salient facts are undisputed.

1. The Board is authorized by Article 51 of the New York Education Law to administer the School District and constitutes an incorporated municipality (N. Y. Ed. Law, Sec. 2502 (1)). The Board "shall have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication * * *" (Sec. 2503).

2. Amongst other powers, the Board is authorized to "determine the school where each pupil shall attend," select sites for school buildings and to exercise its judgment as to the need of any district for a new building (Secs. 2503 (4) (d), 2512 (2) (4)).

3. New Rochelle now has twelve school districts, and long prior to 1930 has had school districts, in each of which is located a public elementary school. As of October, 1960, 6,732 children attended these schools.

4. For many years the Board has followed a neighborhood school policy. The factors which enter into the decision to maintain schools in various residential areas of the city include accessibility to the home (walking distance being important where young children 5 to 11 years of age are involved), traffic and safety problems, and recreational and community facilities afforded to neighborhoods by the school buildings.

5. In drawing any district lines, there must be some contiguity between districts.

2. See e.g. *United States* v. *Prince Ltd.*, 242 U.S. 537 (1917); *Lewis Publishing Co.* v. *Wyman*, 228 U.S. 610 (1913); *Dinsmore* v. *Southern Express Co.*, 183 U.S. 115 (1901).

6. The present Lincoln School building built in 1898 is antiquated.

7. The decision of the Board to replace it was made after a consideration of the many problems presented, including financial and tax problems after an exercise of judgment and after a referendum to the people on the question.

8. New Rochelle does not now have and never has had a school from which Negro children were excluded. Segregation, as the term is popularly used in the various decisions on the subject, has never existed in the school system of the city.

9. During the last 30 years a large number of Negro families have moved into the area in which the Lincoln School is located.

10. In 1949 the Board cancelled a permissive transfer plan because it had a tendency to promote racial imbalance. Since that date all children have had to attend the school within the district of their residence.

The Opinion of January 24, 1961

In its opinion (191 F. Supp. 181) the trial court, in effect, turned the case from a segregated school case into an integration case. This turn was required because there was no proof whatsoever of segregation; there was proof of racial imbalance in various sections of the city. *Brown* v. *Board of Education*, 347 U. S. 483 (1954); 349 U. S. 294 (1955), a true segregation case, was used as the principal reason for ordering the Board to present "a plan for desegregation." Since there was no segregation, obviously there could be no desegregation.

The Board appealed. This court held the appeal to be premature and dismissed it, saying, however, that "this dismissal involves no intimation on our part with respect to the propriety or impropriety of the determination of the District Court," but that "the balance of advantage lies in withholding such review until the proceedings in the District Court are completed." This court made it perfectly clear that all rights were protected "if the finding of liability were ultimately to be annulled." (288 F. 2d 600.) And so the proceeding continued.

Protesting that "since the school system of New Rochelle is not operated on a 'segregated' basis it is impossible to submit a plan which will put an end to segregation" and that the "command to alter the 'racial imbalance' is too vague a standard," the "Board perplexed as to what racial mix meets the requirement of the Fourteenth Amendment" under protest and "in response to the Court's order" submitted a plan which is "neither the choice of the Board nor is its adoption recommended." A minority plan was also filed by three members of the Board. Objections were filed by plaintiffs and the trial court thereafter entered its decree of May 31, 1961.

Upon this appeal this court is charged with the duty of reviewing (1) the trial court's decision of January 24, 1961, and (2) its decree of May 31, 1961.

The Decision of January 24, 1961

First must be considered whether plaintiffs have established a case that the schools of New Rochelle are being operated on such a segregated basis in the year 1961 that desegregation is called for under the doctrine of *Brown* v. *Board of Education*.

Upon the trial plaintiffs failed to establish every factual element necessary to sustain a charge of segregation. There were no "all-white" schools. There were no "all Negro" schools. There were no statutes, rules, regulations or policies denying admission of Negro children to schools attended by whites. The trial court focused its attention primarily on certain events from 1930 to 1949 and from 1949 to 1960 as proof of a purposeful scheme on the part of the Board to turn Lincoln into a segregated school.

The trial court's decision that the Board violated the Fourteenth Amendment is based on two conclusions both of which individually or together were considered sufficient to make out unconstitutional discrimination. The first (I) is "that the Board * * *, prior to 1949 intentionally created Lincoln School as a racially segregated school, and has not, since then, acted in good faith to implement desegregation as required by the Fourteenth Amendment." The second (II) is "that conduct of the Board of Education ever since 1949 has been motivated by the purposeful desire of maintaining the Lincoln School as a racially segregated school."

I

Before turning to the factual basis for the first conclusion, a few general propositions which limit the inquiry to be made when action by a State is challenged as denying equal protection of the laws should be stated. As the Supreme

Court held in *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911):

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Accord, e. g., *McGowan* v. *Maryland*, 6 L. Ed. 2d 393, 29 Law Week 4488 (U. S. Sup. Ct., May 29, 1961). And it is generally the rule that the courts "cannot undertake a search for motive in testing constitutionality." *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220, 224 (1949). It is true that motive is not entirely irrelevant in determining whether action by State administrative officials constitutes unconstitutional discrimination. The discrimination, however, must be intentional or purposeful. A "discriminatory purpose is not presumed * * *; there must be a showing of clear and intentional discrimination." *Snowden* v. *Hughes*, 321 U. S. 1 (1944).

Judged by these standards, can it be said that the present racial imbalance existing in the Lincoln School was clearly created by purposeful and intentional discrimination by the Board? It is an undisputed fact the Lincoln School was built in 1898—long before any of the alleged discrimination is claimed to have occurred, and before there was a substantial Negro population living in the Lincoln neighborhood. Thus, the original selection of the site for Lincoln was not, and could not have been, motivated by a desire to create a segregated school. Next, the record discloses that the Board chose to operate, and has for decades operated, the elementary school system pursuant to a neighborhood school policy under which the city is divided into districts determined by considerations of proximity to the school, safety and school size. And there is no dispute that a plan which classifies students solely on the basis of where they live is, on its face, eminently reasonable and constitutional. Thus, there being nothing illegal in the location of the Lincoln School or in the choice of plans used to allocate students among the various schools, the illegality found by the trial court must of necessity have resulted from the application and administration of this concededly valid plan. Looking at the boundary lines of the Lincoln School district, there cannot be found "an uncouth twenty-eight-sided figure" (see *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), nor two separate zones located in opposite ends of the city (see *Clemons* v. *Board of Education of Hillsboro*, 6 Cir., 1956, 228 F. 2d 853) nor even anything suggesting abnormal or irregular zoning. On the contrary, the Lincoln School lies in the center of a compact district, which, with the exception of a few slight contours, is basically a nonelongated rectangle. Each of the 12 elementary school districts is served by a centrally located school, and in none of the schools is there an all-white or all-Negro enrollment.[3] Moreover, it is also undisputed that the neighborhood school policy is presently strictly adhered to so that white students living in the Lincoln district are not allowed to attend other public elementary schools and Negro students living outside of this district are not permitted or required to attend Lincoln.

The classification used by the Board being reasonable and being administered reasonably and uniformly, further inquiry might well stop at this point because motives of the Board or past Boards are irrelevant. Nevertheless, further pursuit reveals nothing in the record supporting the conclusion that the present situation at the Lincoln School is the result of purposeful discrimination by the Board. In so concluding, the trial court relied heavily on its findings that the Lincoln School district was "gerrymandered" in 1930, and that thereafter the lines were changed so as to contain the Negroes as the population expanded. Specifically, it was

3. For example, Trinity and Jefferson Schools—located in predominantly white neighborhoods—have 5 per cent and 7 per cent Negro enrollments, respectively; Washington, Mayflower and Webster—all contiguous to the Lincoln district—have over 50 per cent, and approximately 30 and 30 per cent, respectively, Negro enrollment.

found that "the boundary lines between Webster and Lincoln were so drawn that, in one section, they were extended to a point directly across the street from Lincoln School"; that this line was moved westward to contain the population expansion of Negroes in the district, and that during the same period, alterations were being made between the Lincoln district and the Mayflower district.

Accepting the fact that the district lines were so moved in this period, this alone does not amount to gerrymandering, unless it be shown that the redistricting was done for the purpose of, and resulted in, the exclusion of white children and the inclusion of Negro children. The proof as to both purpose and effect is fatally defective. No facts were produced to show the racial composition of Lincoln district either before or after the supposed "gerrymandering." In fact, the only testimony relevant to the issue of "gerrymandering" was that of a Mrs. Bertha White, who stated that the redistricting corresponded to Negro population changes. Mrs. White had no first hand knowledge of the situation in 1930; nor did she supply facts and figures as to the racial balance existing at the periods when the lines were changed. Her conclusions were based exclusively on conversations "with children who went to school in 1929 and 1930, who had younger brothers and sisters who went to the school." It is claimed that this hearsay, or perhaps more accurately, double or even triple hearsay, is corroborated by a letter written in 1949 by Kenneth B. Low, former member of the Board. This letter states that "in 1930 the board participated in creating an overbalance of negro pupils in Lincoln School which steadily increased with the development of the neighborhood * * *" This statement cannot possibly corroborate Mrs. White's testimony or be relevant to purposeful discrimination in 1930. No one disputes the fact that as an incident of the neighborhood school policy a racially overbalanced school has resulted but to show an unconstitutional discrimination, it must at least be proven that this overbalance was created intentionally and purposefully, and as to the existence or nonexistence of this fact, Mr. Low's letter adds nothing.

This point, however, need not be belabored since the evidence demonstrates to an almost mathematical certainty that the present "racial imbalance" in the Lincoln School could not have resulted from this alleged "gerrymandering." Had the boundary lines between Lincoln and Webster not been so drawn in 1930 "that, in one section, they were extended to a point directly across the street from the Lincoln School," but instead had been drawn so that the Lincoln School was in the center of its district, the racial balance would have been no different today because the present district lines are now drawn as plaintiffs presumably claim they should have been drawn in 1930. Or had the Board not moved the district lines westward as the Negro population expanded in that direction, again it is clear that Lincoln School today would still be predominantly Negro—in fact, the school being situated as it is in the center of the Negro area of the city, it is highly probable that the racial balance would be even more onesided than it presently is.

What then caused the present "imbalance" in the Lincoln School? The undisputed facts reveal that since 1930 the Negro population in New Rochelle has increased by more than 50 per cent and that the Lincoln School lies in the center of the predominantly Negro area. Because of this heavy concentration and in view of the limited capacity of the Lincoln School, there is virtually no dispute that it would be impossible to draw district lines which would materially alter the present racial imbalance. The conclusion is thus inescapable that the population movement over the years has completely vitiated the effects of any supposed "gerrymandering" in the 1930's.

Similarly, the Board's pre-1949 transfer policy is completely irrelevant in respect to the situation as it exists in 1961. The discriminatory application of this policy may have resulted in the denial of equal protection of the law to Negro children attending Lincoln prior to 1949 and have contributed to the imbalance as it existed in 1949. However, with the passage of twelve years, this court can take judicial notice that the students affected by this policy have progressed beyond the elementary school level. Thus, with the elimination of the permissive transfer policy in 1949, its effects now have entirely disappeared.

The concept of causation pervaded the law long before the adoption of the Fourteenth Amendment or even the United States Constitution. In order to obtain relief from an injury which allegedly results from unconstitutional State action, it is necessary to show both that the State has acted unconstitutionally and that

this action caused the injury of which the plaintiff complains. The plaintiffs' case here is defective on both these requirements.

II

The first basis for the decision below being erroneous, the decision must stand or fall on the trial court's conclusion "that the Board of Education even since 1949 has been motivated by the purposeful desire of maintaining the Lincoln School as a racially segregated school," and that this behavior violated the Fourteenth Amendment.

As the trial court properly noted, "Constitutional rights are determined by realities, not by labels or semantics." Thus, in order to appreciate fully the significance of the decision and to determine exactly what is meant by "purposeful desire maintaining * * * a segregated school," a close analysis of the opinion is necessary. The opinion states that if the illegal motive is present, "it makes no meaningful difference whether the segregation involved is maintained directly through formal separation, or indirectly, through over-rigid adherence to artificially created boundary lines, as in the present case * * * [and] [s]imilarly, it is of no moment whether the segregation is labelled by the defendant, as 'de jure' or 'de facto,' as long as the Board, by its conduct, is responsible for its maintenance" (191 F. Supp. 181, 194). In a footnote, "de jure" is defined as "segregation created or maintained by official act, regardless of its form," and "de facto" is defined as segregation resulting from fortuitous residential patterns. (*Id.* footnote 12.) The minor premise is then supplied by the finding that "the inference is inescapable that the Board's deliberate intransigence and inflexibility for the last eleven years in the face of public pressures and expert advice were motivated by a desire to continue Lincoln School as a racially segregated school, and thus not to alter the racial balance in the city's other elementary schools" (*Id.* at 195), and that the Board by its "arbitrary rejection of all proposals for change has purposefully maintained Lincoln as a segregated school." (*Id.* at 197.)

As previously mentioned, the present racial imbalance at Lincoln did not result and could not possibly have resulted from purposeful conduct (of which there was no convincing proof) by the Board. Moreover, in determining the legal import of the opinion, there must be excluded the finding that the boundary lines of the Lincoln district are artificial because a mere glance at the school district map of New Rochelle refutes this view, as does the undisputed expert testimony that, given the size and location of Lincoln, the lines could not be redrawn so as to materially change the present racial imbalance. Finally, the opinion must be viewed in the light of the entrenched rule of law that only "State action of a particular character is * * * prohibited by the Fourteenth Amendment" (e.g., *Civil Rights Cases*, 109 U. S. 3, 11 (1883); that the "Amendment erects no shield against merely private conduct, however, discriminatory or wrongful" (*Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948)), and that thus if *State action* did not purposefully create the present racial imbalance at Lincoln, the Constitution would not place an affirmative duty on the Board to desegregate. "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration * * *" (*Borders* v. *Rippy*, 5 Cir., 1957, 247 F. 2d 268, 271); "The Constitution in other words does not require integration. It merely forbids discrimination * * *" (*Briggs* v. *Elliott*, E. D. S. C., 1955, 132 F. Supp. 776, 777).[4]

Viewed in this factual and legal context, what then is the rule of law laid down by the court below? The trial court has held in effect that when racial imbalance not attributable to unconstitutional State action is present in a public school, the State or its agencies, although not being required to change the situation, cannot refuse to act if the refusal is motivated by purposeful desire to maintain the condition. In short, the court has extended the Constitution to the

4. See also *Henry* v. *Godsell*, E. D. Mich. 1958, 165 F. Supp. 87: "The fact that in a given area a school is populated almost exculsively by the children of a given race is not of itself evidence of discrimination." Accord, *Sealy* v. *Dept. of Public Instruction of Penn.*, 3 Cir., 1958, 252 F. 2d. 898, cert. den. 356 U.S. 972. The plan that was finally approved in the historic *Brown* case provides for an all Negro school in an all Negro neighborhood. The three judge District Court there stated: "If it is a fact, as we understand it is, with respect to Buchanan School that the district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live." *Brown* v. *Board of Education of Topeka*, D. C. Kan. 1955, 139 F. Supp. 468, 470. Both the judge below and plaintiffs' trial counsel praised the City of Washington, D. C., as a model of integration. The Superintendent of Schools of that city reports that in 1960, after five years of desegregation, 11 out of 60 schools in the system were all Negro; and in 43 schools the white enrollment is less than 10 per cent.

point where motives for State non-action are now relevant. But does not the mere statement of this rule, stripped of its semantic gloss, carry its own refutation? If an existing law or its administration does not violate the Constitution, and if the State is not denying equal protection of the laws by not changing this law, by what alchemy does a refusal to change on the ground of an "illegal motive" turn this non-action into unequal protection of the law? Law is not a state of mind; it is an objective, though perhaps elusive and everchanging, phenomenon.

Rarely are motives for official action subject to inquiry (e.g., *Daniel* v. *Family Security Life Ins. Co., supra; Wilkinson* v. *United States*, 365 U.S. 399, 412 (1961)). At least when a State acts affirmatively, a change in the *status quo* results, and from this change the courts can glean insights into the underlying purpose of the official action. But by what criteria can we judge why men refuse to act when they have no duty to act? Take, for example, the trial court's finding as to the Board's motive for its "intransigence and inflexibility for the last eleven years." This conclusion is supposedly supported by the Board's refusal to adopt a number of plans for changing the Lincoln situation submitted by various experts in school planning.[5] The Dodson Report, for instance, called for:

"1) The rebuilding of a larger Lincoln School on the same site;

2) The discontinuance of Washington School; [6]

3) Extensive redistricting; and

4) The more flexible use of the neighborhood school policy in the future."

A decision to discontinue Washington School and to rebuild Lincoln School or to make any other decision which would affect the school system if the entire city called for the exercise of judgment in the light of existing conditions. It is doubtful that there is "a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion." *Beauharnais* v. *Illinois*, 343 U. S. 250, 262 (1952). Which of the many divergent suggestions of the many experts was the best in the light of other factors which had to be considered? One member of the Board might have been influenced by the costs involved; another by the waste in tearing down an existing school; another might have acted out of sheer inertia; and another might have acted honestly and in the exercise of sound judgment. This latter situation is the only conclusion supported by the facts in the record. Even viewed in a looking glass, any presumption of guilt unless innocence is clearly established has been rebutted. When a decision is intimately connected with local policy and involves matters in which judges have no "expertise" but only "opinions" how can they decide (1) whether a plan should have been adopted and (2) whether its rejection was based on "illegal motives"?

The only affirmative action by the Board was the decision to build a new Lincoln School on the site of old Lincoln. This decision might have been unconstitutional only if it were made for the purpose of creating a segregated school. In view of the Board's rejection of other plans for the specific reason that they would tend to worsen the racial imbalance in New Rochelle, a finding of illegal motive could not be supported, even were it material. Their judgment supported by a city referendum is that the Lincoln district needs a new school; that a new building may well improve the character of the neighborhood; and that mergers of certain districts are not advisable. Why should the Federal courts believe that their crystal ball is of better quality than that of the Board? Moreover, what is the relevance of a new Lincoln to old Lincoln? The decision below is predicated upon the theory that the Board unconstitutionally created and maintained old Lincoln; this theory has no basis in fact. Even assuming, therefore,

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5. The Board had reports from Dodson, Englehardt, Johnson and the decision of the Commissioner of Education of the State of New York after a plenary hearing in a proceeding brought by three of the plaintiffs herein on their own behalf and all others similarly situated attacking the school zones and the decision to build a new Lincoln School on the site of the present school. The Commissioner in part held:

"The issue here before me is not whether some other arrangements may constitute a better solution. The issue, as pointed out heretofore, is whether the Board, after all its investigations and surveys, has been arbitrary in coming to the conclusion it did. Upon the record before me, I cannot find the action of the respondent Board, in determining to replace the Lincoln School with a modern structure and up-to-date facilities, constituted a reversible abuse of discretion" (Ex. K, p. 6).

6. Were Lincoln and Washington combined (assuming such a plan to be geographically feasible—an assumption of doubtful validity), such a district would still have approximately 80% Negro enrolment.

that the decision to build a new Lincoln might have been unconstitutional (which in my opinion it was not), this would not change the fact that as to old Lincoln the Board has not acted unconstitutionally.

Although it should not be necessary, it is worthy of note that the Constitution does not declare what is desirable or undesirable (see, e.g., *Daniel* v. *Family Security Life Ins. Co., supra*); nor should judges confound "private notions with constitutional requirements." (*American Fed. of Labor* v. *American Sash & Door Co.*, 335 U. S. 538, 556 (1949) (concurring opinion, Frankfurter, J.).) Racial imbalance, as it exists in many of our cities and suburbs, presents a serious problem. And yet, I find nothing in the record which makes a racial imbalance a violation of our Constitution.

The Decree of May 31, 1961

Concerned that the majority of the Board should manifest a "continuation of their attitude of arrogance" by their assertion of their constitutional right to claim that "no constitutional rights have been violated" and their adherence to their opinions as to the law instead of recognizing it to be as the trial court declared it, the court, although conceding that it could not "divine every possible eventuality which may arise in the future," decided that "the device of permissive transfers will afford the Negro children in the Lincoln district their constitutional rights." This is the same "device" which until abandoned by the Board in 1949 plaintiffs claim created Lincoln as an all Negro school. Furthermore, if this device does not "assure complete relief" to the court's satisfaction, it announces its availability "to consider other methods"—an assurance of continued court operated schools for the future.

But what will be the effect of this device? The court's decree provides that "*any* child of elementary school age residing in the Lincoln Elementary School District shall be permitted to register and enroll in any other public elementary school in the New Rochelle Public School System, in accordance with the provisions of this decree." (Emphasis supplied.) The Board is required to distribute to the parents "of all children," expected to be enrolled in Lincoln, transfer application forms. Applicants are to list four schools in preferential order to which transfer is desired. The Board is shorn of any discretion "to impose any standard of academic achievement or emotional adjustment as a requirement for transfers" and shall retain each pupil so transferred "until the completion of his elementary education." The transfer privilege must be permanent; otherwise the present condition will revert. If a substantial majority of the present student body at Lincoln plans to avail itself of this privilege, what shall become of the teachers already hired for the coming year? If in 1962, all the students decide to transfer, will Lincoln then have to be closed? But what if five years later a substantial number of students decide not to transfer? Presumably the trial court's Plan implicitly recognizes the right not to transfer. The Board would then be required to remove Lincoln from its mothball fleet, return to active duty, and re-stock it with teachers, janitors, and supplies.

Under this decree the 29 white children (Board statistics, Exh. N) would have the same right to transfer as the 454 non-white children. Assuming a repetition of the effect of the pre-1949 permissive transfer policy, probably a large percentage of the 29 whites would apply. Since the Board could not constitutionally discriminate between races the result would be (as in pre-1949 days) to increase the percentage of Negro children in Lincoln. Thus, for example, were 20 white children and 80 Negro children transferred, the percentage of Negro children would increase from 94% to approximately 98%.

The court's decree is clear. It reads "any child." There cannot be any significance to the court's deletion of the words "without regard to race, creed, color, or national origin" from a somewhat similar provision in the Board's proposed plan. Although the court may override the judgment and discretion of the Board, surely it did not intend to nullify the Constitutions of the United States and the State of New York.

The "equal protection" rights of all other school children of New Rochelle are completely disregarded. How can a permissive transfer policy be granted only to one out of twelve districts? Why should the Negro child in Mayflower, Columbus or Washington be deprived of the privileges granted to the Lincoln district? If concentration of any one group is "segregation" (and hence a constitutional violation), why should not the Jewish or Italian child be given equal privileges to transfer? If, as represented, Columbus is in a depressed economic area and over 90% Italian, is not the proper edu-

cation of a child as important to a resident of the Columbus district as the Lincoln district?

Regardless of protestations to the contrary, the effect and implications of the decision below are to place the operation of the schools of the country in the hands of the Federal courts or a single judge. His personal views as to those pupils who should be granted or denied transfer will control; he alone will decide what racial mixtures satisfy his concept of integration. Of necessity he will have to pass upon district lines if he chooses to permit neighborhood schools to continue. His decrees will cause schools to be built, altered or abandoned. Attendant thereto might be an indirect fixing of the city's school tax rate to accomplish his bidding.

There will be those who will charge that these suggested possibilities are gross exaggerations and that "It Can't Happen Here." But if Federal courts undertake the operation, directly or indirectly, of the public schools, what will be the end result? Recent history has noted other government operations originally justified because business improved and the trains ran on time. In short, I believe that the decree takes away from the people, their duly elected or appointed Boards of Education, and from the States themselves their right to decide by democratic processes upon the educational policies for their communities.

In expressing these views, I am not unmindful, after reviewing the segregation cases from *Brown* v. *Board of Education* to date, that although "the responsibility for public education is primarily the concern of the States" that this responsibility "must be exercised consistently with federal constitutional requirements as they apply to state action." *Cooper* v. *Aaron*, 358 U. S. 1, 19 (1958) and that "[T]he right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law" (*Id.* p. 19). With these broad principles I am in complete accord. But the Constitution should not be a one-sided document. The comity which the judicial branch might well show towards the legislative and executive cannot be better stated than as expressed by Mr. Justice Frankfurter in *McGowan* v. *Maryland*, 6 L. Ed. 2d 393, 455 (1961):

> "Through what precise points in a field of many competing pressures a legislature might suitably have drawn its lines is not a question for judicial re-examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded."

The primary purpose of this action was to declare the neighborhood school policy unconstitutional because it resulted in racial imbalances in a school located in a predominantly Negro residential area. Discretion as to the drawing of district lines should be left to the various school Boards absent such unusual fact situations as existed in *Gomillion v. Lightfoot*, 364 U. S. 339 (1960); *Clemons* v. *Board of Education of Hillsboro*, 6 Cir., 1956, 228 F. 2d 853.

But little comment need be made upon the majority opinion. Its conclusions can be explained in part by the obvious factual misconceptions on which they are based. Thus they say that "On January 11, 1949, the Board adopted a policy of refusing further transfers and of admitting new students only to the school of the district in which they reside." Nowhere, however, does the opinion attempt to show how this pre-1949 policy or the 1930 redistricting has any relevance to the situation at Lincoln in 1961. It is said that since 1949 the Board's actions have led to "a perpetuation and a freezing in" of a segregated condition. But what do "perpetuation" and "freezing in" mean in the context of constitutional prohibitions? And has not the majority—just as did the trial court through its use of such words as "over-rigid adherence," "intransigence," "inflexibility," and "maintained" —introduced, *sub silentio*, a revolutionary concept of State non-action into the Fourteenth Amendment?

In my opinion, the majority neither support nor condemn the neighborhood school policy but place their stamp of approval on the trial court's particular permissive transfer policy. Anomalously enough this very "permissive transfer policy," eliminated in 1949 to preserve a true "neighborhood school policy" so that the schools would accurately reflect the residential character of the neighborhood, is now acclaimed as the solution for the Lincoln School.

Affirmance of the trial court's plan is said to be "in accord with the principles stated in the *Brown* case." The *Brown* case can be searched in vain for its denials of equal protection, for discriminatory favors bestowed upon one group to the exclusion of others and for any mandate, direct or implied, that the Federal courts should

take over the supervision and operation of the school systems throughout the United States. If this is to be its construction of its *Brown* decision that court should make it. Any extension as is now being made by the trial court and the majority here far beyond the bounds of *Brown*, should at least be premised upon some strong indication that the Supreme Court not only was decreeing non-segregation of white and Negro but also was decreeing enforced integration and compulsory racial mixtures according to Federal court formula in every city and hamlet of the country. Such thoughts should not be read into the decisions—or even into the minds—of others lightly.

There being no proof sufficient to sustain the allegations of the complaint, I would reverse and dismiss.

As to the decree of May 31, 1961, it denies, in my opinion, equal protection of the laws and is in derogation of the rights of the people of New Rochelle not to be subjected to discrimination because of race, color, creed, religion or national origin. I realize that, just as my views that pleadings still have a place and function in the law are exceedingly old-fashioned, my belief that the Constitution should apply equally to all our residents may be subject to the same criticism.

Because of the importance of this case to the people of New Rochelle and their Board of Education, I would grant a stay of the decree herein for 30 days to give the defendants an opportunity for such further appellate review as may be available to them in the event they decide to seek such relief.

Supreme Court Opinion

Mr. Justice BRENNAN.

"Petitioners, the Board of Education and the Superintendent of Schools of the New Rochelle School District, ask for a stay of the mandate of the Court of Appeals for the Second Circuit pending the filing and determination of their petition for certiorari to review the judgment of that court filed August 2, 1961. That judgment affirmed, one judge dissenting, the decree of the District Court for the Southern District of New York which, in a class action brought by eleven Negro children through their parents on behalf of all Negro children situated in the Lincoln Elementary School District in New Rochelle, enjoined the petitioners from requiring such children to be registered in the Lincoln Elementary School and required the petitioners to register them in a public elementary school that is racially desegregated. In affirming the district court, the court of appeals stated: 'We see no occasion to grant a stay of the decree; the Board is called upon for no new public expenditures and will suffer no loss, while the school children will be prejudiced by what will soon be necessarily a year's delay at this crucial period in their eductation.' — F.2d —, 30 LW 2069. On August 17, 1961, petitioners applied to the court of appeals for a stay of the mandate pending application to this Court for a writ of certiorari. This application was denied, the court saying: 'The majority of the panel which decided the appeal having stated that a stay should not be granted, and no new facts supporting a stay pending application for certiorari having been presented, the motion for such a stay is denied.'

"The petitioners thereupon filed the instant application on August 25, 1961. I heard oral argument on August 29, 1961. On such an application, since the court of appeals refused the stay '* * * this Court requires an extraordinary showing, before it will grant a stay of the decree below pending the application for a certiorari, * * *.' Magnum Co. v. Coty, 262 U.S. 159, 164. The petitioners have not, in my judgment, carried this heavy burden.

"I am not persuaded that this case will bring before the Court any question presenting a reasonable likelihood of satisfying the standards governing review on certiorari as guided by Rule 19 and the practice of the Court. The petitioners argue in their formal application that there is presented a question 'as to whether there is an obligation on a school district whenever the Negro attendance in a school reaches a high percentage to abandon a rule of law based on residence and to establish a racial quota system.' However, the district court found that the petitioners had deliberately created and purposely maintained the Lincoln Elementary School as a racially segregated school. 191 F. Supp. 181, 29 LW 2338. Upon its own examination of the evidence the court of appeals concluded that 'this crucial finding is * * * supported by the record.' — F.2d. —. Therefore, the question which the petitioners claim is presented by the case (as to which question, and its importance, I intimate no view) could be before this Court only if the Court overturned

the factual findings concurred in by the two lower courts. The petitioners have not suggested substantial reasons for believing that these findings would be held to be clearly erroneous.

"Nor have the petitioners advanced any consideration not already tendered to the court of appeals to indicate a 'decided balance of convenience,' Magnum Co. v. Coty, p. 164, in their favor requiring the suspension of the mandate pending our determination of the petition for certiorari. It is not denied that nothing of substance was advanced to me which was not advanced to the court of appeals.

"In short, no showing is made which would justify my granting this application. '* * * It is clear that the * * * court of appeals gave full consideration to * * * similar motion (s), and with much more knowledge than we can have denied (them). As we have said, we require very cogent reasons before we will disregard the deliberate action of that court on such a matter.' Magnum Co. v. Coty, p. 164."—Brennan, J.

EDUCATION
Public Schools—North Carolina

Valarie McCOY, et al. v. GREENSBORO CITY BOARD OF EDUCATION, et al.

United States District Court, Middle District, North Carolina, Greensboro Division, May 12, 1961, Civil Action No. C–26–6–59, _____F. Supp._____.

SUMMARY: After their applications for reassignment from a colored school to a named white public elementary school had been denied, four Greensboro, North Carolina, Negro children brought a class action in federal court against school officials, seeking a declaratory judgment of their rights to attend city schools without racial discrimination, and an injunction restraining the city board of education from refusing to assign them to the named school "or such school as plaintiffs would attend if they were white." In May, 1959, the board did reassign plaintiffs to white schools, but in July and August, 1959, it approved applications of all the white students and teachers therein for reassignment or transfer to other schools. Plaintiffs then moved for leave to file a supplementary complaint alleging that the actions of the Board since May, 1959, were a part of a general pattern "to maintain and perpetuate, except for token compliance with the Fourteenth Amendment . . . racial segregation in the city school system," and praying for an order restraining the board from further acts of discrimination in the city schools. The district court held that it could not interfere with local school administration by granting relief under the proposed supplemental complaint. It ruled that plaintiffs could assert their constitutional rights under the state pupil assignment act only as individuals and not as a class, and admittedly all of the plaintiffs eligible to attend the school specified in the original complaint had in fact been assigned to that school, and had not exercised their statutory administrative remedy of applying for reassignment to any other school. 5 Race Rel. L. Rep. 75 (1960). On appeal, however, the Court of Appeals for the Fourth Circuit reversed, holding that the original request of the Negro children to attend an integrated school had been effectively frustrated by the board's action in resegregating the school where plaintiffs were assigned. Neither should plaintiffs be required to seek administrative relief again, the court held, since "it is well settled that administrative remedies need not be sought if they are inherently inadequate or are applied in such a manner as in effect to deny the petitioners their rights." The district court was instructed to retain jurisdiction of the case so that the board "may reassign the minor plaintiffs to an appropriate school in accordance with their constitutional rights . . . ." 5 Race Rel. L. Rep. 1027 (1960).

On remand, the district court vacated its order dismissing the complaint, ordered plaint-

iffs to advise the board within ten days which school they desired to attend, and retained jurisdiction so that plaintiffs might apply for further relief if their constitutional rights were denied by the board.

STANLEY, District Judge.

IT APPEARING TO THE COURT that the plaintiffs prosecuted an appeal to the United States Courts of Appeals for the Fourth Circuit from the judgment entered herein on the 23rd day of March, 1960, which appeal was thereafter heard on October 10, 1960, the decision of the Court of Appeals being filed with the Clerk of that Court on November 14, 1960, and the mandate from the Court of Appeals being filed with the Clerk of this Court on December 16, 1960, which mandate directed that the judgment entered herein on March 23, 1960, be reversed and the case be remanded for further proceedings in accord with the opinion of the Court of Appeals; and it further appearing to the Court that the plaintiffs and their attorneys have not heretofore moved for the entry of any judgment or decree upon said mandate of the Court of Appeals, and that counsel for The Greensboro City Board of Education have previously requested counsel for the plaintiffs to make known their views with reference to the form and contents of a decree upon mandate; and it further appearing to the Court that the current school year will terminate on June 2, 1961, and that the attorneys for the plaintiffs have stated that the minor plaintiffs did not wish to be transferred from the schools they are presently attending to some other school during the 1960-1961 school year, this information having previously been given by the attorneys for the plaintiffs to the attorneys for the Board; and it further appearing to the Court that school assignments for children in their Greensboro School System for the school year beginning in September 1961 will be made by The Greensboro City Board of Education on or about May 30, 1961:

NOW, THEREFORE, in accordance with the aforesaid mandate of the Court of Appeals, the summary judgment entered herein on March 23, 1960, dismissing the complaint and this action with prejudice as to The Greensboro City Board of Education and its named members and adjudging that the taxable costs herein shall be paid by the plaintiffs shall be, and the same is hereby, vacated and set aside, and the Court retains jurisdiction of this case so that the Board may reassign the minor plaintiffs, Valarie McCoy, Eric McCoy, Thetus McCoy and Michael Tonkins, to an appropriate school in accordance with their constitutional rights and so that the plaintiffs, if these rights are improperly denied by the Board, may apply to this Court for further relief; AND IT IS FURTHER ORDERED that the plaintiffs herein shall advise The Greensboro City Board of Education within ten (10) days from the date of the entry of this order to which school or schools the plaintiffs desire that the Board reassign the aforesaid minor plaintiffs for the school year commencing in September, 1961.

Entered at Greensboro this 12 day of May, 1961.

EDUCATION
Public Schools—North Carolina

Priscilla MORROW, et al. v. MECKLENBURG COUNTY BOARD OF EDUCATION, et al.

United States District Court, Western District, North Carolina, Charlotte Division, June 22, 1961, Civil Action No. 1415, 195 F.Supp. 109.

SUMMARY: A class action was brought in a federal district court by Negro school children seeking to enjoin the county school board from refusing to reassign them to all-white schools under the North Carolina Pupil Assignment Act. In two successive years, plaintiffs had ap-

plied for reassignment, their applications had been denied, and they had thereupon attended an all-Negro school. Thereafter, they brought this action in federal court, alleging that they should have been admitted to an all-white school because they lived closer to it than to the all-Negro school they attended. The complaints were dismissed. Several of the plaintiffs had by now finished the grades available at the school to which they sought reassignment, and the court ruled that it had no power to determine whether they were entitled to be reassigned to any school other than the one to which they had applied. As to the remaining plaintiffs, the court accepted the Board's contention that "distance from a school has never been a determinative factor in the assignment of pupils because of the extensive use of buses throughout the State," and concluded that the Board "acted in good faith in denying the requests for reassignment and that it acted fairly and justly toward these plaintiffs, and not discriminatorily because of their race or color." It was also held that plaintiffs could not bring a class action because there had been no showing that others in their class had exhausted their administrative remedies under the North Carolina Pupil Assignment Law.

WARLICK, J.

This is a civil action instituted by the fathers of eight Negro children, seeking to enjoin the defendant, the Mecklenburg County Board of Education from refusing to reassign the minor plaintiffs to certain schools within the Board's jurisdiction, on account of their race and color. Originally when the action was instituted plaintiffs sought a judgment of restraint and other relief from the defendant, Mecklenburg County Board of Education and its individual members, and additionally made parties defendants certain former members of said Board,—the North Carolina Advisory Committee on Education,—its Chairman and Vice-Chairman, and its individual members were likewise made defendants, and additionally the North Carolina State Board of Education, together with each of its members was added to that long list of those named as defendants. However, all of the defendants were eliminated at various times during the progress of the cause save and except the defendant. The Mecklenburg County Board of Education, which was and is the only defendant against whom a valid judgment could have been had under the pleading filed.

Jurisdiction for the action as alleged in the complaint is based on 28 U.S.C.A. 1331, as an action arising under the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C.A. 1981. In addition, jurisdiction is invoked under 28 U.S.C.A. 1343, as an action authorized by 42 U.S.C.A. 1983. The plaintiffs assert it to be a class action authorized by Rule 23 (a) (3) of the Federal Rules as there are common questions of law and fact affecting the rights of all other Negro children attending the public schools of Mecklenburg County, and their respective parents and guardians, who, are so numerous as to make it impracticable to bring all before the court. This the defendant denies, and alleges that it relies upon Article 21 of Chapter 115 of the North Carolina General Statutes (The Assignment and Enrollment of Pupils Act), and has accordingly considered each child as an individual entity.

The basic and essential facts are not in dispute.

The plaintiffs are members of the Negro race and are citizens and residents of Mecklenburg County, North Carolina, and each of the minor plaintiffs is eligible for admission to the public schools of Mecklenburg County.

At present all of the minor plaintiffs attend Torrance Lytle School which at the times complained of in the complaint and since, is a consolidated type school, offering grades one through twelve. It was and is attended solely by members of the Negro race. It is located approximately nine to eleven miles from the respective homes of the plaintiffs.

The defendant Mecklenburg County Board of Education is a body corporate under and by virtue of Chapter 115, Section 27, General Statutes of North Carolina. At the times set out in the complaint, and up to July 1, 1960, the defendant had jurisdiction of all public schools in Mecklenburg County which were located outside the corporate limits of the City of Charlotte. On July 1, 1960, the Charlotte City of Board of Education, pursuant to the provision of Chapters 378 and 556, Session Laws of North Carolina, 1959, was merged into the defendant, and since that date the defendant Board has had jur-

isdiction of all schools in Mecklenburg County, including those schools formerly operated under the jurisdiction of the Charlotte City Board of Education.

Following the decision of Brown v. Board of Education (347 U.S. 483), the North Carolina General Assembly enacted the Assignment and Enrollment of Pupils Act (G.S. 115-176) which had as its purpose vesting these matters solely in the hands of the local school authorities. In handling the assignment of pupils the local boards are required to adopt enrollment practices which will "provide for": (1) "Orderly and efficient administration" of the schools; (2) "effective instruction", (3) "health," (4) "safety," and (5) "general welfare" of the pupils.

On August 2, 1957, the defendant Board, pursuant to this Act, for the first time adopted a formal resolution assigning students to schools for the 1957-1958 school year. Generally, the students were assigned to schools which they had attended the previous year or at which they had attended "Pre-School Clinics" conducted by defendant Board at all the schools. On or about August 7, 1957, the minor plaintiffs were assigned by defendant Board to the Torrence Lytle School. Notice of the assignment was given to the plaintiffs under the provisions of N.C.G.S. 115-177. The plaintiffs, through their parents in apt time applied for reassignment to Derita Elementary-Junior High School (N.C.G.S. 115-178), and the applications were denied by defendant Board on August 22, 1957. On August 26, the plaintiffs requested review of the denial, and on August 30, a hearing was held on said requests for reassignment and the minor plaintiffs and one or both of the parents of each were present. They were represented by counsel, and a quorum of the Board was in attendance. On September 3, 1957, the Board denied the application of each of the minor plaintiffs, properly notifying them of this decision, and during the 1957-1958 school year, the minor plaintiffs attended Torrence Lytle School.

All of the prior plaintiffs were again assigned to Torrence Lytle School by defendant, The Mecklenburg Board, on June 1, 1958, for the school year 1958-1959. The infant plaintiffs, through their parents made application for reassignment to the Derita School except that Frank Boyce submitted an application on behalf of Frank Boyce, Jr., for reassignment to North Mecklenburg High School. The requests for reassignment were denied by defendant Board on June 26, 1958, and plaintiffs requested review of this denial on June 30. The hearing was held on August 6, 1958, and the appeals were denied by defendant Board on August 25, 1958.

The Derita School to which the plaintiffs sought reassignment is located approximately 1½ miles from their homes. At the time complained of in the complaint, it offered grades one through nine, and was attended solely by students of the white race. During the 1960-61 school year Derita School offered grades one through seven, and was likewise attended solely by white students.

The minor plaintiffs are transported by bus to Torrence Lytle School as the defendant Board operates a bus system for students living more than one and one-half miles from their schools as required by law. N.C.G.S. 115-186 (2). Bus service would not have been afforded these plaintiffs had they been assigned to Derita School because of their nearness to the school.

North Mecklenburg School to which Frank Boyce sought reassignment of Frank Boyce, Jr., offered grades ten through twelve at the time complained of in the complaint and also at present. It is located approximately seven miles from the home of plaintiff Boyce.

Each of the minor plaintiffs was assigned to Torrence Lytle School for the school year 1959-1960, and also for the school year 1960-61, with no application for reassignment having been made on behalf of any of them for either year. At Torrence Lytle School they now attend the grades which are set opposite their names below:

Priscilla Morrow	5th grade
Doris Hunter	6th grade
Barbara Dianne Boyce	6th grade
Howard Eugene Boyce	4th grade
Foster Hunter	10th grade
Frank Boyce, Jr.	12th grade
Clarence Edward Boyce	9th grade
Jerry Nathaniel Boyce	10th grade

Seemingly the desire of every young person in America for an education has inspired the respective agencies in each of the several states to do their dead level best to make such available to those young people who seek the privilege of attending school. North Carolina is

particularly proud of its position in the educational field in America. Its aim is quality education for all.

For the first three months of the 1960-61 school year there was enrolled in the public schools of North Carolina 1,111,014 boys and girls of school age. Those in charge of administering the educational affairs of the state have become deeply wedded to the consolidated school principle, and have accordingly deemed it the part of a wise school administration to so consolidate high schools as to permit them to take care of a given number of elementary schools, all making for a system of transportation by school bus of the children from their homes to the schools attended, and return each day.

540,000 children are being transported daily by bus to public schools in North Carolina. In order to complete this program of transportation some pupils are transported, as the necessity may arise, as great a distance as 40-50 miles one way each day. North Carolina operates 8,383 school busses and these busses travel each school year in the aggregate amount of 54,000,000 miles.

There are 227 school busses operated in Mecklenburg County by the State of North Carolina. Mecklenburg has 96 public schools, each of which is under the control of the defendant. There are enrolled in the public schools of Mecklenburg County 61,226 pupils, and this out of a population of 272,111.

This vast enterprise is conducted by ten members who constitute the defendant Board. They are the successors in membership to the old County and City Boards prior to July of 1960. The membership of defendant is non partisan, with each member being nominated at the time of the holding of the State Wide Primary, their names appearing on a separate ballot. None of the Board members receives any salary and the small per diem that is granted is often not accepted, as each member seemingly considers his service on this Board as a gratuity and worthy of his time and effort.

One cannot but be impressed with the personnel of this Board. It includes an outstanding minister of the gospel, an attorney whose practice is statewide, an executive of a vast chain store organization that extends into 15-20 states of our Union, and others whose positions in the life of Mecklenburg County are high in leadership and outstanding in ability. They must be motivated by a desire to aid their community else they surely would duck this type of service.

The plaintiffs contend that though the defendant Board purports to maintain a system of permitting tranfers among schools without regard to race, the system it maintains in fact implements a policy of racial discrimination; that the Board's policy is to maintain a segregated school system which is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Factually, the plaintiffs argue that there were white students attending Derita School who lived as many as six miles further away than the plaintiffs; that the Board, after considering all available information concerning the minor plaintiffs, failed to provide standards by which it would weigh objectively and evaluate the information it studied in order to grant or deny transfers; and that the Board at times permitted the Superintendent to make transfers for the school year 1958-1959 of both Negro and white children without Board action for administrative reasons, such as change of residence, utilization of available classroom space, and availability of bus transportation, but that all of these were from Negro to Negro schools and white to white schools.

The defendant Board contends that it has no policy of maintaining a segregated school system, but that by custom and by choice, students of different races have attended different schools. The Board states that it had no applications for reassignment after those of 1958 until 1960 at which time the Board assigned both originally and upon request for reassignment Negro students to formerly all white schools, with members of the Board who were members at the time complained of in the complaint voting to grant the 1960 request.

The defendant asserts that distances from a school had never been a determinative factor in the assignment of any student to a particular school as the laws of the State provided for the extensive use of school busses, and that in both years that the plaintiffs sought reassignment, the Board was faced with the problem of overcrowding at the Derita School, where six rooms which had not been designed or arranged for classrooms were being used as such to accommodate the large number of students assigned

there. In addition, a busload of students within the statutory "walking distance" of Derita School was being transported to a more distant school in order to relieve the situation at Derita. On the contrary the evidence shows that there are no crowded facilities or lack of accommodations at the Torrence-Lytle School.

There seems no point in belaboring the question as to the constitutionality of the North Carolina Pupil Assignment Law as this question has been affirmatively decided by the Fourth Circuit Court of Appeals and by the North Carolina Supreme Court. Carson v. Warlick, 238 F.2d 724; Covington v. Edwards, 264 F.2d. 780; Joyner v. McDowell County Board of Education 244 N.C. 164. From these decisions it is clear that the Federal Court is not authorized to act until the administrative remedies have been properly sought and it is shown that the Act is being unconstitutionally administered. After the hearing and final decision thereon, if one is not satisfied, and can show that he has been discriminated against because of his race, he may then apply to the Federal Court for relief. Covington v. Edwards, Supra. This procedure has been followed by the plaintiffs in this action and there need be no objection to the joining as plaintiffs of all the named applicants for transfer as the relief sought by each is identical. However, as to whether the action is applicable to others similarly situated as a class action, is not borne out by the evidence. There has been no showing that others have been denied reassignment after an exhaustion of their administrative remedies provided by the Pupil Assignment Law, and therefore the court will consider only the eight minor plaintiffs named in the complaint.

From the record it appears that Frank Boyce, Jr. is a senior in high school, scheduled to graduate in June of 1961, and presumably received his diploma. He, therefore, is obviously precluded from consideration in this matter as the fall semester of 1961 is contemplated as the effective date of this decision. Additionally, it is noted that Foster Hunter, Clarence Edward Boyce, and Jerry Nathaniel Boyce are no longer eligible for enrollment in the Derita School to which they sought reassignment in their complaint, in that they have now finished the grades available at Derita. This does not necessarily preclude them from reassignment as evidently the class to which they sought reassignment has moved on to another school in the expanding school system; however, under the North Carolina Pupil Assignment Law, each individual child must petition and show his individual basis and circumstance meriting reassignment to a particular school. As that aspect would be missing it would be a rather presumptious sort of thing for this court to usurp the School Board's authority, delegated to it by the North Carolina General Assembly, and determine whether these three minor plaintiffs are entitled to reassignment to a school other than the one they presently attend, and other than the one to which they originally sought reassignment.

Turning to the four remaining children, the issue is whether they were discriminated against because of their race by the Board's refusal to grant their requests for reassignment. Thus the central point in controversy is whether the provisions of the North Carolina Pupil Assignment Act were unconstitutionally applied to the plaintiffs in 1957 and 1958. After a careful study of the evidence, the court is of the opinion that the defendant Board has conscientiously complied with the requirements placed upon it, and that the plaintiffs have failed to show wherein they were discriminated against because of their race. In their requests for reassignment, the plaintiffs all state as their reasons therefor that they lived closer to the Derita School than to the Torrence-Lytle School, and that they desired a desegregated education. It has been defendant's position throughout that distance from a school has never been a determinative factor in the assignment of pupils because of the extensive use of busses throughout the State and county, all as has been set out heretofore.

The plaintiffs allege that Negro children entering school for the first time are required to attend "pre-school clinics" in schools attended only by Negro pupils; however, the record is devoid of any evidence showing this to be true, and the evidence in fact discloses that children attend the school to which they are presented on a basis of individual choice by their parents; that defendant Board has issued no directives stating the schools to which particular children should be presented for enrollment; and the evidence does not disclose that any Negro child was ever denied enrollment in any school under the Board's jurisdiction.

As for the plaintiff's assertion that the North Carolina Pupil Assignment Law is made applicable only to Negro children, this is not sub-

stantiated by the record, for that in answer to the plaintiff's interrogatories, the defendant attached several such requests made by white students, all of which requests were denied. The plaintiffs have clearly failed to show that defendant Board has made a deliberate attempt to thwart their constitutional rights as appeared in the case of Farley v. Turner, 281 F.2d 131, and the case of Gibson v. Board of Public Instruction 272 F.2d 763.

Then too, the Supreme Court stated in substance in Cooper v. Aaron, 358 U.S. 1, that opposition to desegregation was not alone a sufficient reason to postpone integration. But, the Court also stated in substance in the first *Brown* decision, 347 U.S. 483, that one of the factors that the trial court could consider in resolving the question is the interest of the people who are affected in the community; therefore, the circumstances as they existed in 1957 and 1958 are important in determining whether the individual plaintiffs have been discriminated against. The Board faced with the obligation of operating a large school system was also for the first time acting under the North Carolina Pupil Assignment Act. The 1957 applications for reassignment were the first to be received by defendant Board from Negro students seeking transfer to schools which had been attended only by members of the white race, and it was only natural that the Board approached the matter with extreme caution. The evidence shows that a careful study was made of each individual applicant in order to determine the possibility of making the transition with a minimum of ill effect upon the individual child and upon the school system, and although it may have proved of value to the Board in ascertaining the attitude and desire of each child, the children's parents gave little help and did not allow them to be questioned by the Board members at the hearings which were held in both of the years in question and denied the right of the Board to make inquiry of the children.

Naturally the maintenance of a dual system based on race offends the constitutional rights of the plaintiffs; however the Supreme Court points out in the second Brown decision, 349 U.S. 294: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing Constitutional principles."

No truer statement of the position of school officials and their responsibility to the pupils in the schools following the Brown decision could have been made in a more understandable way, or as a finer legal doctrine, than that written by Chief Judge Parker when he said:

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration." Carson v. Warlick, 238 F.2d 724.

Integration in the public schools in the City of Charlotte is not new for that through the years following the Brown decision quite a number of Negro children have been integrated into white schools and a feeling of accord and understanding has evidently grown up in Charlotte and Mecklenburg County regarding the status of school children.

North Carolina has likewise followed a similar course and one among the best instances of such is to be found in the case of Griffith v. Board of Education of Yancey County, 186 F.Supp. 511, a decision written by the undersigned judge, in which eight Negro children were integrated into the white high schools of Yancey County, North Carolina, without difficulty and were accepted in good faith by the community as a whole.

Accordingly it is the opinion of this court that, in the light of the condition existing at the times complained of, the defendant Board acted in good faith in denying the requests for reassignment and that it acted fairly and justly toward these plaintiffs, and not discriminatorily because of their race or color.

I Conclude as a matter of Law:

The court has jurisdiction of the subject matter and the parties. 28 U.S.C.A. 1331, 1343, as authorized by 42 U.S.C.A. 1981, 1983.

The Plaintiffs have failed to show that they

are entitled to any injunctive relief against the Defendant.

The Plaintiffs have failed to show that the defendant Board has unconstitutionally applied the provisions of the North Carolina Pupils Assignment Act in such a manner as to discriminate against them because of their race or color.

Counsel will submit decree in accordance with this opinion.

EDUCATION
Public Schools—North Carolina

Stanley Boya VICKERS, etc., v. CHAPEL HILL CITY BOARD OF EDUCATION.

United States District Court, Middle District, North Carolina, Durham Division, August 4, 1961, 196 F.Supp. 97.

SUMMARY: A Negro school child brought action in a federal district court against the Chapel Hill, North Carolina, school board to have declared his right to attend a named all-white public school. In 1959, plaintiff had applied for reassignment to an all-white elementary school which was closer to his home than the all-Negro school to which he was assigned. This application was denied by the board. In 1959, the board also adopted a policy that beginning with the 1960-61 school year, first grade Negro students would be reassigned without regard to race. In 1960, plaintiff applied for reassignment to an all-white high school which was farther from his home than the all-Negro high school to which he was assigned. This application was also denied by the board. The court ruled that plaintiff's application was denied on account of his race, that plaintiff had exhausted his administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, and that he was entitled to be admitted to the named all-white high school.

STANLEY, Chief Judge.

This action was commenced by plaintiffs, members of the Negro race, on February 2, 1960, to have declared the right of the minor plaintiff, and the class of persons he represents, to attend the public schools of Chapel Hill and Carrboro, North Carolina, without discrimination on account of race or color, and for injunctive relief. Named defendants, in addition to the Chapel Hill City Board of Education, were the individual members of the Board and the Superintendent of the Chapel Hill Schools. Upon motion of the defendants, the action was dismissed as to the individual members of the School Board and the Superintendent since it was concluded that the plaintiffs, if they prevail in this action, are entitled to obtain complete relief against the Chapel Hill City Board of Education.

The case was tried before the court on October 5, 1960, following which the parties were given a specified time within which to file proposed findings of fact, conclusions of law, and briefs, after which oral arguments would be heard.

The requests for findings of fact, conclusions of law, and briefs of the parties having been received, the court, after considering the pleadings and evidence, including exhibits, answers to interrogatories and stipulations filed, and briefs and oral arguments of the parties, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated:

FINDINGS OF FACT

1. The plaintiffs are members of the Negro race and are citizens and residents of Carrboro, North Carolina, a town adjacent to Chapel Hill, North Carolina. The Carrboro Public Schools are within the Chapel Hill School Administrative Unit.

2. The minor plantiff possesses all the qualifications necessary for admission to the public schools within the Chapel Hill School Admin-

istrative Unit. The adult plaintiffs are parents and next friends of the minor plaintiff.

3. The defendant Board, a body corporate, maintains and generally supervises the operation of the public schools in the Chapel Hill School Administrative Unit, and possesses such powers as are conferred by Chapter 115 of the General Statutes of North Carolina.

4. During the 1959-1960 school term, the defendant Board operated six schools which were attended solely by white students, and two schools which were attended solely by Negro students.

5. At the end of the 1958-1959 school term, the minor plaintiff, then being ten years of age, completed the fifth grade of Northside Elementary School and was assigned to the same school for the 1959-1960 school term. Northside Elementary School is a school attended solely by Negro students.

6. On June 23, 1959, following the initial assignment to the Northside Elementary School for the 1959-1960 school term, the minor plaintiff, through his parents, timely filed a written application for transfer to the Carrboro Elementary School, a school attended solely by white students. This was the only application filed by a Negro student for reassignment to another school for the 1959-1960 school term, and was only the second such application that had ever been filed with the defendant Board. There were approximately 1,100 Negro students attending the Chapel Hill public schools during the 1959-1960 school term.

7. The reasons given as to why reassignment to the Carrboro Elementary School was desired were that Carrboro Elementary School was nearer the residence of the plaintiffs, and that there was a stigma attached to segregated education which affected the "learning" of the minor plaintiff.

8. The actual distance from the home of the plaintiffs to the Northside Elementary School was approximately one mile, measured by the best available route, and about one and one-half miles by the school bus route, whereas the distance to the Carrboro Elementary School was approximately one-half mile. However, the distance from the home of the plaintiffs to the school bus serving the Northside Elementary School was approximately three blocks, which was considerably nearer their home than the Carrboro Elementary School.

9. Many white children of the same grade level as the minor plaintiff, and living near his home, were initially assigned to and did attend the Carrboro Elementary School for the 1959-1960 school term.

10. The application for reassignment to the Carrboro Elementary School was denied by the defendant Board on August 3, 1959, and the minor plaintiff thereafter, through his parents, made timely application for a hearing before the defendant Board.

11. The requested hearing was granted and the plaintiffs were duly notified that the hearing would be conducted on August 31, 1959. Present at the hearing were members of the defendant Board, the minor plaintiff and his parents, and C. O. Pearson, Esquire, representing the plaintiffs. At the opening of the hearing, the Chairman of the defendant Board outlined the procedure to be followed and stated that the Board was ready to hear testimony in support of the application of the minor plaintiff for reassignment. Mr. Pearson, as counsel for the plaintiffs, read a statement outlining the relative distance from the home of the plaintiffs to the Northside Elementary School and the Carrboro Elementary School, and protested to the fact that no steps had been taken to desegregate the public schools in the Chapel Hill School Administrative Unit. No other testimony was offered.

12. Following the hearing, the defendant Board, by a divided vote, again denied the application for reassignment, and gave the following as its reasons for the action taken:

> "In the absence of any evidence or testimony on behalf of the applicant in support of the request for reassignment, and the Board having heretofore ascertained that the applicant, Stanley Boya Vickers, has been attending Northside Elementary School for five years and completed the fifth grade in said school, which is a good elementary school, with facilities, teaching staff and curricula comparable to other elementary schools in the Chapel Hill school district, and that said minor applicant has made satisfactory educational progress, and it not having been made to appear that

the reassignment requested will be for the best interest of the child, it is hereupon determined that the request for reassignment be denied."

13. Dr. J. Kempton Jones, Chairman of the defendant Board, stated that in his opinion if the minor plaintiff had been a white student, he would have been assigned to the Carrboro Elementary School for the 1959-1960 school term. Another Board member stated that there could be no dispute about the fact that white children living in the immediate area of the plaintiffs were assigned initially to the Carrboro Elementary School for the 1959-1960 school term, without regard to any qualifications other than being white. Still another Board member stated that he did not personally know of any basis other than race on which the application of the minor plaintiff for a transfer could have been denied.

14. On August 3, 1959, the defendant Board adopted the following policy with respect to the reassignment of first grade students, beginning with the 1960-1961 school year:

"The stated policy of this Board is to ordinarily grant the request for reassignment of prospective 1st graders to a school in closer geographic proximity to their place of residence than the school to which they might have been assigned. Such requests for reassignment and all other requests for reassignment based on other factors will be processed by the Chapel Hill City Board of Education in accordance with applicable statutes of the State of North Carolina, to wit., G.S. 115-178 and related laws."

15. This action was commenced on February 2, 1960, alleging that the application for reassignment was denied solely on the basis of race, and asking that the court declare the right of the minor plaintiff, and the class of persons he represents, to attend the public schools of Chapel Hill and Carrboro, North Carolina, without discrimination on account of race or color, and for injunctive relief.

16. In July, 1959, the defendant Board, in accordance with the policy adopted in January, 1958, put into effect a program known as the "6–3–3 program," which provided for elementary schools of six grades, junior high schools of three grades, and senior high schools of three grades. In accordance with this program, the seventh grade at Carrboro Elementary School was eliminated, beginning with the 1960-1961 school term.

17. The minor plaintiff made satisfactory progress and received effective instruction at the Northside Elementary School, and completed the sixth and last grade of that school in June of 1960.

18. In April, 1960, it was brought to the attention of the court that Carrboro Elementary School, the school to which the minor plaintiff had requested reassignment, would only have six grades beginning with the opening of school in September, 1960, and thereafter, and for this reason the minor plaintiff, who would satisfactorily complete the sixth grade at Northside Elementary School on June 8, 1960, would be ineligible to attend the Carrboro Elementary School during the 1960-1961 school term. Under these circumstances, it was agreed that the minor plaintiff, if dissatisfied with his 1960-1961 assignment, would timely file application for reassignment to another school, and if still dissatisfied with the final action of the defendant Board, would file a supplemental complaint setting forth the facts with respect thereto.

19. For the 1960-1961 school term, the minor plaintiff was initially assigned to Lincoln Junior-Senior High School, a school attended solely by Negro students.

20. At the time initial assignments were made, there were white children of the same grade level living near the minor plaintiff who were assigned to the Chapel Hill Junior High School for the 1960-1961 school term.

21. On June 14, 1960, the minor plaintiff made timely application for transfer from the Lincoln Junior-Senior High School to the Chapel Hill Junior High School, a school attended solely by white children. The application, signed by the minor plaintiff's mother, specified that the transfer was desired because Chapel Hill Junior High School was exclusively a junior high school, whereas Lincoln Junior-Senior High School was a junior and senior high school combined, and because she was opposed to assignment based upon race.

22. The application for reassignment to the Chapel Hill Junior High School was denied by the defendant Board on June 27, 1960, following

which a hearing was requested. The defendant Board granted the request and scheduled the hearing for July 22, 1960. The plaintiffs were duly notified of the date and place of the hearing.

23. Present at the hearing, in addition to the members of the defendant Board, were Mrs. Lattice Vickers, mother of the minor plaintiff, and C. O. Pearson, Esquire, and William A. Marsh, Jr., Esquire, counsel for the plaintiffs. At the opening of the hearing, the Chairman of the defendant Board outlined the procedure to be followed, and stated the Board was ready to hear testimony in support of the application. Mr. Pearson read a memorandum outlining the reasons why he felt the application should be granted, and asked the Board members if there were any questions they desired to ask Mrs. Vickers. After establishing the fact that the plaintiffs then lived nearer the Lincoln Junior-Senior High School than the Chapel Hill Junior High School, the meeting adjourned.

24. The defendant Board thereafter met in executive session and, by a three to one vote, the Chairman abstaining, denied the request for reassignment, and gave the following as its reason for the action taken:

> "In the absence of any evidence or testimony on behalf of the applicant pertinent to the request for reassignment and it not having been made to appear that the reassignment requested will be for the best interest of the child, and the Board being of the opinion that the reassignment requested would not be for the best interest of the child, it is hereupon determined that the request for reassignment is denied."

25. The Chairman of the defendant Board testified that, in his opinion, had the minor plaintiff been a white child, he would have been assigned to the Chapel Hill Junior High School for the 1960-1961 school term. One of the other Board members testified that he was of the opinion that race was a factor in denying the application for reassignment.

26. In accordance with the policy adopted by the defendant Board on August 3, 1959, all first grade Negro students requesting transfer to another school for the 1960-1961 school term were assigned to the school of their choice. This resulted in some first grade Negro students being assigned to schools formerly attended solely by white students.

27. At the time he filed application for transfer from the Lincoln Junior-Senior High School to Chapel Hill Junior High School for the 1960-1961 school term, the minor plaintiff lived nearer Lincoln Junior-Senior High School than Chapel Hill Junior High School, the former being about one-half mile from his home and the latter being about one mile.

28. Following the final denial of minor plaintiff's application for reassignment to the Chapel Hill Junior High School, the plaintiffs, after having first obtained leave of court, filed a supplemental complaint alleging that the reassignment of the minor plaintiff was denied solely on account of race, and praying for injunctive relief.

DISCUSSION

The questions for decision are (1) whether the plaintiffs exhausted their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act,[1] and (2) whether the minor plaintiff was refused reassignment to the Chapel Hill Junior High School because of his race.

With respect to the first question, it is conceded that the plaintiffs properly filed written applications for reassignment, and proper written requests for Board hearings, in 1959 and 1960. It is further conceded that the applications and requests were filed within the times prescribed by Section 115-178, General Statutes of North Carolina. The only contention made by the defendant is that there was no adequate compliance with this statute, and consequently no adequate exhaustion of administrative remedies, since the plaintiffs failed to swear witnesses and present testimony at the hearings. In making this argument, the defendant relies principally upon Holt v. Raleigh City Board of Education, D.C.E.D.N.C.1958, 164 F.Supp. 853, affirmed 1959, 4 Cir., 265 F.2d 95; certiorari denied 1959, 361 U.S. 818, 80 S.Ct. 59, 4 L.Ed.2d 63. There is no merit to this contention. The Holt case only holds that applicants for reassignment are delinquent in failing to attend Board hearings for the purpose of being interrogated and furnishing all relevant information in their possession. The minor plaintiff and both of his parents

1. Section 115-176 through 115-179, General Statutes of North Carolina.

attended the Board hearing in 1959, and the mother of the minor plaintiff attended the hearing in 1960. Additionally, at the 1960 hearing, Mrs. Vickers was tendered to the defendant Board for any questions the members might care to ask her. The written applications were full and complete, and it is reasonable to assume that the Board had all the information desired to enable it to make its decision. The only valid criticism to be offered is the failure of the plaintiffs in their 1960 application to give the relative distances from their home to the schools involved, but this is not sufficient, particularly when viewed in light of the experience of the plaintiffs before the defendant Board in 1959, to hold an inadequate exhaustion of administrative remedies. It is concluded that the plaintiffs have clearly established an exhaustion of their remedies provided by state law before applying to the court for relief.

The evidence further establishes that the minor plaintiff was denied reassignment to the Chapel Hill Junior High School because of his race. He had every right to be reassigned to the Carrboro Elementary School for the 1959-1960 school term. He lived much nearer the Carrboro Elementary School than the school to which assigned. Many white children of the same grade level living in his area where assigned to the Carrboro Elementary School, and the Chairman and two of the members of the Board testified that they were of the opinion that race was a factor in denying the application. If the minor plaintiff had been accorded his constitutional rights in 1959, he undoubtedly would have been transferred to the Chapel Hill Junior High School for the 1960-1961 school term.

Residence is an important factor present in 1959, but not present in 1960. The minor plaintiff lived much nearer the Carrboro Elementary School than the school to which assigned for the 1959-1960 school term, but lived nearer the Lincoln Junior-Senior High School than the school to which reassignment was sought for the 1960-1961 school term. However, it was stipulated that white children of the same grade level living near the plaintiffs were assigned to the Chapel Hill Junior High School for the 1960-1961 school term, and the Chairman and another member of the Board testified that they were of the opinion that the minor plaintiff would have been assigned to the Chapel Hill Junior High School had he been a white child. The testimony of other Board members was not offered. The fact that a decision was made by the defendant Board in the summer of 1959 to reassign first grade Negro students without regard to race, commencing with the 1960-1961 school term, while most commendable, is an indication that a majority of the Board members felt that it was not feasible to treat reassignment applications filed by other students in the same manner.

After considering the entire record, including the reasons assigned by the majority of the members of the defendant Board for denying the applications of the minor plaintiff for reassignment, it is concluded that the plaintiffs have established by a preponderance of the evidence that the minor plaintiff was denied reassignment to the Chapel Hill Junior High School for the 1960-1961 school term on account of his race. In reaching this conclusion, the court entertains no doubt about the absolute good faith and integrity of the members of the defendant Board, or that they based their decision on what they considered to be to the best interest of the minor plaintiff and the other students that would be affected. The Board members have undoubtedly labored under most difficult circumstances, and there is not the slightest basis for the apprehension expressed by defense counsel that if the plaintiffs prevail in this action the individual Board members will stand convicted in the eyes of the community which they serve of being "guilty of racially motivated discriminatory denial of constitutional rights." The fact that the Board members acted from the highest of motives, and based their decision on what they considered would be for the best interest of their community, does not alter the fact that the minor plaintiff has been denied substantial constitutional rights. The conclusion is inescapable that the race was an important factor in the decisions made with respect to the transfer of the minor plaintiff.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter.

2. The plaintiffs adequately exhausted administrative remedies afforded them by state statutes before applying to the court for relief.

3. The minor plaintiff was denied reassignment to the Chapel Hill Junior High School for the 1960-1961 school term on account of his

race, and is entitled to be admitted to that school for the 1961-1962 school term.

Counsel for the plaintiffs will present an appropriate decree after having first submitted same to counsel for the defendant for approval as to form.

EDUCATION
Public Schools—North Carolina

Warren H. WHEELER, etc., et al. v. DURHAM CITY BOARD OF EDUCATION.
C. C. SPAULDING, III, etc., et al. v. DURHAM CITY BOARD OF EDUCATION.

United States District Court, Middle District, North Carolina, Durham Division, July 20, 1961, Nos. C-54-D-60 and C-116-D-60, 196 F.Supp. 71.

SUMMARY: Negro school children brought a class action in a federal district court for a declaratory judgment of their right to attend the Durham, North Carolina, public schools without racial discrimination, and for injunctive relief. During the summers of 1959 and/or 1960, plaintiffs had applied for reassignment from all-Negro schools under the North Carolina Assignment and Enrollment of Pupils Act [1 Race Rel. L. Rep. 240, 938, 939 (1956)]. In 1959, the city school board had initially reassigned seven Negro high school students to all-white schools, and seven more were initially reassigned in 1960. Those students who were initially denied reassignment gave notice of appeal and were granted a special hearing before the board. Almost every plaintiff filed a memorandum stating that the desire to attend a desegregated school was the principal reason for requesting reassignment. After the hearings, the board denied all the applications not previously granted. The board did not adopt any criteria for considering such applications, and some were denied because the parents failed to attend the special meetings, some because the city's elementary schools were overcrowded, and some for no stated reason. The district court held that plaintiffs could not bring a class suit, but could only sue to enforce their individual rights; that before bringing a suit, they must first exhaust their administrative remedies; and that only those plaintiffs who themselves or through their parents had attended the special meetings had exhausted those remedies. The court also found that the board had followed discriminatory practices in that it had maintained dual attendance areas, one for each race, that it had given notice of school assignments too late for effective pursuit of administrative remedies, and that it had not adopted standards for considering reassignment applications. The board was therefore ordered to reconsider separately and on its individual merits the application of each plaintiff who had exhausted his administrative remedies, to render a decision based upon definite criteria applicable to white and Negro children alike, and to report to the court these criteria, the action taken on each application, and, as to those denied, the reason for denial. [For related litigation, see *McKissick v. Durham City Board of Education*, 4 Race Rel. L. Rep. 864 (1959)].

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

STANLEY, Chief Judge.

These class actions, consolidated for trial, were commenced by the plaintiffs, members of the Negro race, against the Durham City Board of Education, to have declared the rights of the minor plaintiffs and the class of persons they represent to attend the public schools of the City of Durham without discrimination on account of race or color, and for injunctive relief. All the plaintiffs are citizens of the City of Durham, North Carolina, and the minor plaintiffs are all eligible to attend the Durham public schools. The adult plaintiffs are the parents or

guardians of the minor plaintiffs, and bring this action individually and as next friend of said minors.

The complaint in No. C-54-D-60, entitled "Warren H. Wheeler, a Minor, by J. H. Wheeler, his father and next friend, et als v. Durham City Board of Education, a body politic in Durham County, North Carolina," hereinafter referred to as the "Wheeler" case, was filed on April 29, 1960, by 118 adult plaintiffs personally and as next friend of 163 minor plaintiffs, on behalf of themselves and all other citizens of the City of Durham, North Carolina, similarly situated. The complaint in No. C-116-D-60, entitled "C. C. Spaulding, III, a Minor, by C. C. Spaulding, Jr., his father and next friend, et als v. Durham City Board of Education, a body politic in Durham County, North Carolina," hereinafter referred to as the "Spaulding" case, was filed on September 12, 1960, by 90 adult plaintiffs personally and as next friend of 116 minor plaintiffs, on behalf of themselves and all other citizens of the City of Durham, North Carolina, similarly situated. The Wheeler case relates to the 1959-1960 school year, and the Spaulding case relates to the 1960-1961 school year. Many of the plaintiffs in the Wheeler case are also plaintiffs in the Spaulding case.

It appearing that both cases involved common questions of law and fact, and that a consolidation would reduce cost and delay, the plaintiffs' motion for consolidation was allowed. Named defendants in both cases, in addition to the Durham City Board of Education, were the individual members of the Board and the superintendent of the Durham City Schools. Upon motion of the defendants, the actions were dismissed as to the individual members of the School Board and the superintendent, since it was concluded that the plaintiffs, if they prevailed in these actions, are entitled to obtain complete relief against the Durham City Board of Education, a body corporate.

At the conclusion of the trial, the court gave the parties a specified time within which to file proposed findings of fact, conclusions of law, and briefs, after which the parties would be heard orally.

The requests for findings of fact, conclusions of law, and briefs of the parties having been received, the court, after considering the pleadings and evidence, including exhibits, answers to interrogatories and stipulations filed, and briefs and oral arguments of the parties, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated:

FINDINGS OF FACT

1. Plaintiffs in both cases are members of the Negro race and are citizens and residents of the City of Durham, North Carolina. Each minor plaintiff possesses all the qualifications for admission to the public schools of the City of Durham. The adult plaintiffs are the parents or guardians of the minor plaintiffs and bring these actions individually and as next friend of said minors, on behalf of themselves and all other citizens of the City of Durham, North Carolina, similarly situated.

2. The defendant, Durham City Board of Education, is a body corporate and maintains and generally supervises the operation of the public schools for the City of Durham, North Carolina. In operating the public schools for the City of Durham, the defendant exercises such powers and duties as are conferred upon it by Chapter 115 of the General Statutes of North Carolina.

3. The defendant operates and maintains two high schools in the City of Durham, namely, Durham High School and Hillside High School. Durham High School is located in the nortwest area of the city and Hillside High School is located in the southern area of the city. Prior to the 1959-1960 school year, Durham High School was attended solely by white students and Hillside High School was attended solely by Negro students.

4. The defendant operates and maintains four Junior high schools in the City of Durham, namely: Brogden Junior High School, located in the northern area of the city; Carr Junior High School, located in the northwest area of the city; East Durham Junior School, located in the eastern area of the city; and Whitted Junior High School, located in the southern area of the city. Prior to the 1959-1960 school year, Brogden Junior High School, Carr Junior High School and East Durham Junior High School were attended solely by white students and Whitted Junior High School was attended solely by Negro students.

5. The defendant operates and maintains 17 elementary schools in the City of Durham, namely: Club Boulevard Elementary School,

located in the northeast area of the city; Edgemont Elementary School, located in the eastern area of the city; Fuller Elementary School, located in the central area of the city; Holloway Street Elementary School, located in the eastern area of the city; Morehead Elementary School, located in the southern area of the city; North Durham Elementary School, located in the north-central area of the city; E. K. Poe Elementary School, located in the northwest area of the city; Y. E. Smith Elementary School, located in the northwest area of the city; Southside Elementary School, located in the western area of the city; George W. Watts Elementary School, located in the north-central area of the city; Burton Elementary School, located in the southeast area of the city; Crest Street Elementary School, located in the northwest area of the city; East End Elementary School, located in the northeast area of the city; Lyon Park Elementary School, located in the southwest area of the city; W. G. Pearson Elementary School, located in the southeast area of the city; C. C. Spaulding Elementary School, located in the southern area of the city; and Walltown Elementary School, located in the north-central area of the city. Club Boulevard Elementary School, Edgemont Elementary School, Fuller Elementary School, Holloway Street Elementary School, Morehead Elementary School, North Durham Elementary School, E. K. Poe Elementary School, Y. E. Smith Elementary School, Southside Elementary School and George W. Watts Elementary School have always been and are now attended solely by white students. Burton Elementary School, Crest Street Elementary School, East End Elementary School, Lyon Park Elementary School, W. G. Pearson Elementary School, C. C. Spaulding Elementary School and Walltown Elementary School have always been and are now attended solely by Negro students.

6. On May 30, 1960, there were 1757 students in attendance at the white high and junior high schools, 5503 students in attendance at the white elementary schools, 1053 students in attendance at the colored high and junior high schools, and 4847 students in attendance at the colored elementary schools.

7. School census reports are prepared annually by the defendant for the purpose of assigning students in a manner which employs the schools accommodation of the City of Durham to the best advantage.

8. The Negro and white elementary school children in the City of Durham at all relevant times have been assigned to schools in the first instance solely on the basis of school zones delineated on two maps of the City of Durham, with the exception of a few children outside of such attendance zones because of physical disabilities. One of these maps, which includes the entire City of Durham, is divided into zones for Negro elementary students only. The other map, which includes the entire City of Durham, is divided into zones for white elementary students only. The school zones are defined by availability of school facilities, population density, distance and race.

9. On August 4, 1959, the defendant School Board held a regular meeting at which time initial assignments of students to the various schools for the 1959-1960 school year were made. Notices of the assignments were published in the Durham Morning Herald, a daily newspaper published in the City of Durham, on August 7 and 14, 1959.

10. Each child then attending a school by assignment from the Board was assigned to the same school for the 1959-1960 school year, except those children having satisfactorily completed the course of instruction of the school previously attended were assigned to the next succeeding grade in the school which served the graduates of the school from which they had graduated. This resulted in children graduating from the all white elementary schools being assigned to the all white junior high schools, and graduates of the all white junior high schools being assigned to the Durham High School, which had theretofore been attended solely by white students. It also resulted in Negro students graduating from all colored elementary schools being assigned to the Whitted Junior High School, and graduates of Whitted Junior High School being assigned to the Hillside High School. As earlier noted, Whitted Junior High School and Hillside High School were attended solely by Negro children. All white children entering school for the first time were assigned to all white elementary schools in accordance with the "white" attendance zone map, and all Negro children entering school for the first time were assigned to all Negro elementary schools in accordance with the "Negro" attendance zone map. The notice of assignments provided that applications for reassignment would

be received according to the laws of the State of North Carolina, and that such applications must be presented to the principal of the school to which the child had been assigned.

11. With a few exceptions, the assignments resulted in each Negro child being assigned to the all Negro school nearest his home, and each white child being assigned to the all white school nearest his home. In many instances, minor plaintiffs lived nearer comparable all white schools than the all Negro schools to which assigned. This was particularly true with reference to high and junior high schools.

12. Following the initial assignments on August 4, 1959, approximately 225 Negro children, including the plaintiffs in the Wheeler case, in apt time, filed with the defendant Board applications for reassignment from the all Negro schools to which they had been assigned, to schools attended solely by white students.

13. On August 25 and 28, 1959, the defendant Board held special meetings and considered each of said applications for reassignment to the Durham High School, two were assigned to Brogden Junior High School, and two were assigned to Carr Junior High School, all being schools presently attended solely by white students. No Negro elementary school students were reassigned. The parents of each of the minor plaintiffs in the Wheeler case were duly notified of the action of the Board.

14. Thereafter, each of the plaintiffs in the Wheeler case gave notice of appeal and requested a hearing on their respective applications for reassignment. The hearings were set for September 21, 1959, at 7:30 p.m., and each of said plaintiffs was duly notified of the date and place thereof. There is some contention that a few of the plaintiffs did not file their applications for a hearing within the time prescribed by law, but the record is not clear as to which applications were not timely filed. In any event none of the applications were denied because of failure to file same in time.

15. In practically every instance, the plaintiffs listed their desire to attend desegregated schools as the principal reason for requesting reassignment. Other reasons, such as the desired school being closer, overcrowded conditions in the school to which assigned, better facilities and opportunities, and the like, were in some instances listed as to why reassignment was desired.

16. At the opening of the hearing held on September 21, 1959, C. O. Pearson, Esquire, one of the attorneys for the plaintiffs, stated that he desired to file powers of attorney executed by each of the adult plaintiffs. He further stated that he and associate counsel had prepared a memorandum on behalf of each of the plaintiffs setting forth their reasons as to why the applications for reassignment should be granted. The following memorandum was then read as typical of the memorandum prepared on behalf of each plaintiff:

"NORTH CAROLINA
DURHAM COUNTY

Before the Durham City Board of Education

"In re: Appeal from rejection of reassignment application, C. O. Pearson, M. Hugh Thompson, J. H. Wheeler, F. M. McKissick and William A. Marsh, Jr., Attorneys for W. A. Clement and wife, Mrs. W. A. Clement, parents of Arthur John Clement, who was assigned by the Durham Board of Education to the C. C. Spaulding School on a racial basis, hereby appeals to the said Board from the denial of application for reassignment heretofore filed in apt time and rejected by the said Board, and respectfully requested that the said child be assigned to the school to which reassignment has been sought, and said application for reassignment was based on the fact that a white child situated as this applicant is would have been assigned to the school to which this applicant sought reassignment.

"Applicant's fundamental objection to the assignment and denial of request referred to above in that the Durham City Board of Education is maintaining a school system in which children are assigned to schools on the basis of race, contrary to the 14th Amendment of the United States Constitution.

"Applicants respectfully pray that the Durham City Board of Educa-

tion take affirmative steps to abolish racial discrimination within the system and to assign applicant without regard to race.

"This the 21st day of September, 1959.

Submitted by counsel."

After reading the memorandum, Mr. Peason stated that the plaintiffs had nothing further to say which they felt would be of aid to the Board in arriving at a decision. The chairman of the Board called the names of each of the applicants to determine who were present. Before doing so, the chairman stated that it was not necessary for the children to be present, but that at least one of the parents of each of the minor children should be present, and that it was not enough for the parents to be represented by counsel. It was then determined that 63 of the adult plaintiffs and 50 of the minor plaintiffs were absent.

17. The defendant Board held an executive session immediately following the hearing. A resolution was first adopted denying all the applications for reassignment in cases where at least one parent was not present for the reason that this constituted "failure to comply with the requirements for exhausting administrative remedies provided by law."

18. The defendant Board next adopted a resolution denying all the applications for reassignment to elementary schools, and gave the following as its reasons for denying these applications:

"In taking this action regarding elementary pupils, members of the Board reaffirmed the position taken by the Board at a special meeting August 25, 1959, to the effect that (1) elementary schools to be built shortly will relieve materially the crowded conditions in a number of schools, and (2) that changes in the pattern of school population makes it unwise and perhaps impossible to transfer numbers of elementary pupils at the present time."

19. The defendant Board finally adopted a resolution denying all the applications for reassignment to junior high schools and the Durham High School, but gave no reason for its denial of these applications.

20. On August 1, 1960, the defendant Board, at a regular meeting, made initial assignments of students to various schools for the 1960-1961 school year. Notices of the assignments were published in the Durham Morning Herald on August 3 and 10, 1960.

21. Generally, the initial assignments of students for the 1960-1961 school year were made on the same basis as the initial assignments for the 1959-1960 school year, including the use of the "Negro" and "white" zone maps in the assignment of elementary students. Except for the Negro students previously assigned to Brogden Junior High School, Carr Junior High School, and Durham High School, the initial assignments for the 1960-1961 school year had the effect of continuing complete segregation in all the Durham city schools.

22. Following the initial assignments made on August 1, 1960, approximately 205 Negro children, including the plaintiffs in the Spaulding case, in apt time, filed with the defendant Board applications for reassignment from the all Negro school to which they had been assigned.

23. As in the Wheeler case, the plaintiffs in the Spaulding case, in practically every instance, listed the desire to attend desegregated schools as the principal reason why reassignment was requested. Other reasons, such as the desire to attend a school nearer their home, overcrowded conditions in the school to which assigned, better opportunities and better facilities in the school they desired to attend, and the like, were listed in some instances as to why reassignment was desired.

24. On August 24, 1960, the defendant Board held a special meeting and considered each application for reassignment, including the applications of the plaintiffs in the Spaulding case. The Board approved the applications of three students for reassignment from Hillside High School to Durham High School, the applications of two students for reassignment from Whitted Junior High School to Brogden Junior High School, and the applications of two students for reassignment from Whitted Junior High School to Carr Junior High School. All the remaining applications for reassignment, including the applications of all the plaintiffs in the Spaulding case, were denied. The Board stated that the denial of the remaining applications was necessary "in order to best promote the orderly

and efficient administration of the public schools of this unit, the effective instruction of children subject to assignment by the Board, and the health, safety, and general welfare of such children, and each of them, and for the proper utilization of the physical facilities presently available."

25. Thereafter, each of the plaintiffs in the Spaulding case made timely and proper applications for a hearing on the denial of their applications for reassignment, and the parents of each of said minor plaintiffs were duly notified by the defendant Board that a meeting would be held in the auditorium of the Fuller School building on September 12, 1960, at 7:30 p.m., for the purpose of conducting the requested hearings.

26. At the opening of the hearing, William A. Marsh, Jr., Esquire, one of the attorneys for the plaintiffs, stated that he and his associate counsel held powers of attorney from the parents of each of the minor plaintiffs. Among other things, the powers of attorney authorized plaintiffs' counsel to represent them "in conference with school officials and in any administrative hearings before the School Board and with the School Board members in devising a desegregation program," as well as to handle any litigation deemed necessary to protect their rights and the rights of other children to nondiscriminatory education in the City and County of Durham, North Carolina. The powers of attorney were then filed with the secretary of the defendant Board. Mr. Marsh further stated that he and his associates had prepared a written memorandum for each child, setting forth reasons why the Board should reverse its previous action and grant the reassignments requested. The memoranda were couched in practically the identical language as the memoranda filed with the Board by C. O. Pearson, Esquire, on September 21, 1959, in connection with the hearings in the Wheeler case. The chairman of the Board thereupon called the names of each of the minor plaintiffs to determine who were present. It was determined that 35 of the adult plaintiffs and 75 of the minor plaintiffs were absent. In cases where parents were present, the chairman of the Board generally asked them if there was any additional evidence they desired to present or any statement they cared to make. In most instances the reply was in the negative. In a few instances, the parents protested the continuation of a segregated school system in the City of Durham.

27. At an executive session of the defendant Board immediately following the hearing, the Board first adopted a resolution denying all the applications for reassignment to elementary schools, and the minutes disclosed the following as its reasons for denying these applications:

> "This action was taken primarily because pupils involved in nearly every instance lived nearer the school to which they were originally assigned, or near enough to that school to make no significant difference in travel distance. Among other reasons, it was pointed out that enrollment already reported in several schools to which reassignment was sought was overtaxing school facilities, that the pending vote on annexation made reassignments extremely undesirable at the present time, and that the building program to relieve overcrowdedness was about six months behind schedule in providing additional class room space."

28. The Board next denied all the applications for reassignments to junior high schools and the Durham High School "since no new information was presented at the hearing that would justify change in previous action of the Board."

29. School had commenced several days before the aforementioned hearings were conducted on September 21, 1959, and September 12, 1960. The 1959-1960 school year commenced on September 2, 1959, and the 1960-1961 school year commenced on August 30, 1960.

30. On December 1, 1960, Durham High School was overcrowded 16.2 per cent; Carr Junior High School was overcrowded 14 per cent; East Durham Junior High School was overcrowded 7.3 per cent; Morehead Elementary School was overcrowded 11 per cent; Hillside High School was overcrowded 12 per cent; Whitted Junior High School was overcrowded 18.3 per cent; Burton Elementary School was evercrowded 12.2 per cent; W. G. Pearson Elementary School was overcrowded 19.5 per cent and C. C. Spaulding Elementary School was overcrowded 18.2 per cent. Durham High School and Hillside High School are presently being

enlarged, and it is anticipated that the overcrowded conditions will be alleviated to some extent by the commencement of the 1961-1962 school term.

31. At least one of the parents, or person standing in *loco parentis,* of the following minor plaintiffs in the Wheeler case attended the hearing conducted by the defendant Board on September 21, 1959: Warren H. Wheeler, Carrie M. Barnes, Nathaniel A. Barnes, Jr., Alma Frances Barnes, Patricia Branch, Mary Branch, Michael Branch, Jerry Branch, Sloan Branch, Ronald E. Burgess, Frank E. Burgess, Festus Cameron, Barbara Ann Cole, Elvin J. Cole, Ronald M. Cole, Rose Mary Cole, Anna Louise Dunston, Robert D. Dunston, Barbara J. Dunston, Jessie R. Dunston, Deborah E. Ferguson, John E. Ferguson, Carol E. Ferguson, Adaphine C. Fogg, Deardrah G. Greene, Dwight R. Greene, Ronald L. Greene, LaFayette Greene, Olivia Harris, Cynthia J. Harris, Eleanor L. Harris, Veda A. Hedgepath, Sonja Hedgepath, Linda F. Hedgepath, Linwood Jones, Clarence Ray Jones, Billy J. Jones, Larry E. Johnson, Eric L. Johnson, Shirley Johnson, Ellie Mae King, Ronald E. King, Phyllis F. King, Philip King, Beverly Ann King, Therron E. McCall, Gloria J. Morris, Peggy Morris, Faye Virginia Morris, Alfred D. Morris, Johnie Morris, Jr., Samuel Lee Morris, Dennis L. Morris, Phyllis A. Thompson, Augustus R. Thompson, Jr., Thelma E. Whitley, Mildred Whitley, Shirley Belinda Henderson, Cherolyn J. Henderson, Gertie Mae Badgett, Susie Badgett, Willie L. Badgett, Carrie M. Barnes, Nathaniel Barnes, Alma Frances Barnes, Mary Ellen Davis, Charles Spaulding, III, Robert Lee Valines, Pauline Valines, Larry T. Valines, Melbagene Brown Daye, Erroll A. Booker, Lyle C. Booker, Day Fugard Reed, Ronald W. Reed. Thomas Earl Prince, Harriet L. Prince, Jacquelyn Prince, Michael A. Crawford, Joyce E. Crawford, Conny Lee Crawford, Marvin C. Crawford, Barbara Jean Crawford, Lana Jeanette Brame, Constance C. Brame, Anita L. Brame, Claudette C. Brame, Margaret L. Waller and Brenda Simmons. None of the other minor plaintiffs in the Wheeler case attended the hearing conducted by the Board on September 21, 1959, and none were represented by either of their parents or person standing *loco parentis.* Each of said children, however, was represented by the attorneys to whom their parents had given powers of attorney.

32. At least one of the parents, or person standing in *loco parentis,* of the following minor plaintiffs in the Spaulding case attended the hearing conducted by the defendant Board on September 12, 1960: Bobbie Jean Bailey, Robert Lee Bailey, Rosalind Faye Bailey, Alex Eli Bullock, Jr., Carolyn Delores Lee, Kenneth Ray Lee, Stella Louise Lyons, Cynthia Juanita Manuel, George Anthony Marrow, Fred Mason, Leroy Donell Mason, Lee Burton Porter, Jr., Maria Theresa Porter, Richard Francis Porter, Clintonice Lenell Rinehart, Beverly Eardell Scott, Hilda Juinita Scott, Joyce Aninita Scott, Donald Shelton Smoke, Wanna Faye Smoke, Aaron Alston Strudwick, Bernadette P. Strudwick, Leora Bailey, Cynthia LaCress Bullock, Linda Mae Bullock, James O'Dell Daniel, Jr., Bertha Ann Gunn, Jimmy Anthony Mann, Francis Louise Marrow, Gladys Luvenia Mason, Elijah Burnis Smoke, Jr., Jacqueline Vernell Smoke, Lindsey H. Strudwick, Ronald Lee Strudwick, Patricia Ann Sutton, Zretta Bailey, Mary Elizabeth Bailey, Marva Maxine Bullock, Brenda Joyce Gunn, James Jackson Henderson, Eloyd Ray Lyons, Evonne Marie Smoke, Carrie Linda Sutton and Warren Hervey Wheeler. None of the other minor plaintiffs in the Spaulding case attended the hearing conducted by the Board on September 12, 1960, and none were represented by either of their parents or person standing in *loco parentis.* Each of said children, however, was represented by the attorneys to whom their parents had given powers of attorney.

33. The notice with respect to the hearings conducted on September 21, 1959, and September 12, 1960, set forth no information plaintiffs were required to submit, and contained no standards or procedural regulations for said hearings.

34. Before and at the time of the hearings conducted on September 21, 1959, and September 12, 1960, the defendant Board had access to the school records of all the minor plaintiffs, and possessed information concering achievement, residence and distance from schools of each of the minor plaintiffs. Before these meetings, the Board members had decided among themselves that no applications for change of assignments to elementary schools be granted.

35. At the time of the hearings conducted on September 21, 1959, and September 12, 1960, including the time the final action was taken on

the applications of the minor plaintiffs in both cases for reassignment, the defendant Board had not adopted any criteria or standards by which to judge applications for change of pupil assignment.

DISCUSSION

The principal questions for decision are (1) whether the plaintiffs have exhausted their administrative remedies under the North Carolina Assignment and Enrollment of Pupils Act, and (2) whether any of the minor plaintiffs were refused reassignment on account of race or color.

I

WHETHER THE PLAINTIFFS HAVE EXHAUSTED THEIR ADMINISTRATIVE REMEDIES UNDER THE NORTH CAROLINA ASSIGNMENT AND ENROLLMENT OF PUPILS ACT.

A history of the operation of the Durham public schools following the Brown decisions, and prior to the commencement of the 1959-1960 school year, is set out in some detail in *McKissick* v. *The Durham City Board of Education*, 176 F. Sup. 3 (M.D. N.C., 1959). There this court, while holding that the plaintiffs had failed, and indeed had not even attempted, to comply with the state statutes relating to the enrollment and assignment of pupils, specifically condemned the method employed by the defendant in giving assignment notices, and particularly the delay in making assignments. It was observed that some of the resolutions adopted by the defendant Board strongly suggested that reassignments were being denied solely because of the race and color of the applicants. Notwithstanding these observations, the defendant has apparently continued its practices of assigning elementary students on the basis of two sets of city maps, one zoned exclusively for white students and the other zoned exclusively for Negro students, and the practice of giving assignment notices at times which make it practically impossible for students to exhaust their administrative remedies prior to the commencement of school terms. On the other hand, the plaintiffs continue to engage in practices which strongly suggest a lack of good faith compliance with the state statutes dealing with the enrollment and assignment of pupils. All the administrative remedies in the two cases under consideration were pursued after the pronouncements of the court in *Holt v. Raleigh City Board of Education*, 164 F. Supp. 863 (E. D. N.C., 1958); affirmed 4 Cir., 265 F. 2d. 95 (1959) cert. den. 361 U. S. 818, 80 S.Ct. 59, 4 L.Ed. 2d. 63 (1959), holding that students seeking reassignment are delinquent in failing to attend hearings before school boards, and that appearance by an attorney is insufficient. The fact that administrative remedies provided under the state statutes, if fairly administered, must be exhausted before courts of the United States will grant injunctive relief in suits of this type, and the fact that such rights must be asserted as individuals, and not as a class or group, is no longer subject to debate. *Carson v. Board of Education of McDowell County*, 4 Cir., 227 F. 2d 789 (1955); *Carson v. Warlick*, 4 Cir., 238 F. 2d 724 (1956); cert. den. 353 U. S. 910, 77 S.Ct. 665, 1 L.Ed. 2d 664; *Covington v. Edwards*, 165 F. Supp. 957 (1958); affirmed 4 Cir., 264 F. 2d 780 (1959); *Holt v. Raleigh City Board of Education*, 164 F. Supp. 863, (E.D. N.C., 1958) affirmed 4 Cir., 265 F. 2d 95 (1959); cert. den. 361 U. S. 818, 80 S.Ct. 59, 4 L.Ed. 2d 63 (1959); *McKissick v. Durham City Board of Education*, 176 F. Supp. 3 (M.D. N.C., 1959). It should be emphasized that we are not dealing with a situation where a school board had a fixed policy to maintain a pattern of total segregation in its school system, thereby relieving the plaintiffs of the requirement of the doing of a vain thing as a condition of relief. In advance of the hearings conducted on September 21, 1959, the defendant had desegregated the Durham High School, Brogden Junior High School and Carr Junior High School, and in advance of the hearings held on September 12, 1960, additional Negro students had been assigned to each of these previously all white schools.

Except in one or two instances, there was no attempt to explain the absence of the 63 adult plaintiffs and 50 minor plaintiffs at the hearings held in connection with the applicants in the Wheeler case, or the absence of 35 adult plaintiffs and 75 minor plaintiffs at the hearings held in connection with the applicants in the Spaulding case. The fact that they were represented by counsel is not sufficient. *Holt v. Raleigh City Board of Education, Supra.* It is also significant that at the hearings conducted on September 21, 1959, in connection with the applicants in the Wheeler case, the chairman of the defendant Board stated that at least one

of the parents of each minor child should be present, and that it was not enough for the parents to be represented by counsel. The same attorneys appeared for the plaintiffs in both cases and, as earlier noted, some of the plaintiffs in the Wheeler case are also plaintiffs in the Spaulding case.

The applications for reassignment filed on behalf of the minor plaintiffs in both the Wheeler and Spaulding cases gave little information, other than the desire to attend an integrated school, as to why reassignment was requested. It was indicated in some instances that the school to which reassignment was sought was closer to the home of the applicant than the school to which assigned, but relative distances were not given. It is apparent that most of the plaintiffs in both cases were seeking a totally integrated school system rather than reassignment to any particular school. As has been repeatedly stated, the Constitution of the United States does not require integration, but merely forbids discrimination. *Briggs v. Elliott*, 132 F. Supp. 776 (E.D. S.C. 1955), and *Thompson v. County School Board of Arlington County*, 144 F. Supp. 239 (E.D. Va. 1956). The parents of the minor plaintiffs involved were certainly in possession of the approximate distances to the various schools, and other pertinent data, and it is possible that they would have received different treatment from the school board had this information been supplied. While it is true that most of the pertinent information was available to the defendant Board from the school records in its possession, this is no valid excuse for the plaintiffs not supplying such data. However, so far as is disclosed by the record, none of the applications were denied for failure to supply adequate information. Another significant fact is that the defendant Board had not established criteria or standards by which to judge applications for change of assignment.

In view of the manner in which the applications in question were handled by the defendant Board, and particularly the reasons assigned for denying the applications, it is concluded that those minor plaintiffs who attended either of the board hearings, or who were represented by one of their parents, or persons standing in *loco parentis*, adequately complied with the state statutes dealing with enrollment and assignment of pupils, and adequately exhausted their administrative remedies under those statutes. It is further concluded that those minor plaintiffs who did not attend either of the hearings, or who were not represented by at least one of their parents, or persons standing in *loco parentis*, did not adequately exhaust their administrative remedies prior to the institution of these actions.

These actions were instituted as class actions, and the plaintiffs are seeking, in addition to the protection of their individual rights, a decree integrating the entire Durham School System. However, the court is limited to the protection of the individual rights of those plaintiffs who exhausted their administrative remedies prior to the institution of the actions. As earlier noted, the United States Supreme Court has never suggested that mass mixing of the races is required in public schools. It has simply required that no child shall be denied admission to a school of his choice on the basis of race or color. There is, of course, no objection to a number of plaintiffs joining in the same suit, as was done in the cases under consideration. The fact that the plaintiffs have designated their cases as class actions, does not preclude the court from considering each application filed on behalf of the minor plaintiffs on its individual merits. *Covington v. Edwards*, 4 Cir., 2 F. 2d 780 (1959).

II

WHETHER ANY OF THE MINOR PLAINTIFFS WERE REFUSED REASSIGNMENT ON ACCOUNT OF RACE OR COLOR.

There can be little question but that many of the practices followed by the defendant Board during the 1959-1960 and 1960-1961 school terms were discriminatory and thus forbidden by the Fourteenth Amendment to the Constitution of the United States.

It is conceded that the defendant Board maintained a dual system of attendance areas for elementary students based on race. This offends the constitutional rights of the plaintiffs "and cannot be tolerated." *Jones v. School Board of Alexandria, Virginia*, 4 Cir., 278 F. 2d 72 (1960). While it was shown that in most instances the dual system of attendance areas resulted in children, both white and colored, being assigned to elementary schools nearest their homes, this does not remove the constitutional barrier against the maintenance of dual attendance

areas, and the plaintiffs are entitled to have such dual attendance areas abolished.

Section 115-177, General Statutes of North Carolina, confers upon school boards the right to make assignments of pupils in various ways. One of the prescribed ways is to give "notice of assignment of groups or categories of pupils by publication at least two times in some newspaper having general circulation in the administrative unit." The defendant Board technically complied with this statute by giving notice of initial assignments by publishing a notice two times in a Durham newspaper, but the publications were so late as to make it practically impossible for pupils desiring reassignment to pursue their administrative remedies prior to the opening of school. Whether these late publications were through inadvertence or by design makes little difference. The fact remains that school boards are required to reasonably administer the assignment statutes if pupils are to be required to exhaust their administrative remedies under these statutes before applying to the courts for relief.

Another serious infirmity in the administration of the law relating to the enrollment and assignment of pupils by the defendant Board has been the failure of the Board to adopt any criteria or standards for considering applications for reassignment, and the failure of the Board to apply such criteria or standards equally to whites and Negroes in the same situation. The courts have uniformly approved residence and academic preparedness as appropriate criteria for considering applications for transfer. A variety of other criteria would undoubtedly be appropriate in given situations, so long as such criteria are not used in such a way as to deprive individuals of their constitutional rights. *Jones v. School Board of the City of Alexandria*, Virginia, 4 Cir., 278 F. 2d 72 (1960); *Dodson v. School Board of City of Charlottesville*, 4 Cir., 289 F. 2d 439 (1961); *Shuttleworth v. Birmingham Board of Education*, 162 F. Supp. 372, affirmed 358 U.S. 101, 79 S.Ct. 221, 3 L.Ed. 2d 145.

On the other hand, the defendant Board has been confronted with many preplexing problems. Both high schools have been badly overcrowded. The same is true of all the junior high schools, except Brogden Junior High School. Many of the elementary schools, both white and colored, have also been taxed beyond their capacity to adequately care for the children enrolled. These overcrowded conditions have been somewhat aggravated by other areas being annexed to the Durham School Administrative Unit within the past several months. An enlargement program is under way at both high schools, and it is anticipated that this work will be completed by the commencement of the 1961-1962 school term. Other buildings are either contemplated or under construction. It should be emphasized that the defendant Board has made a significant and good faith start toward desegregating the schools in its administrative unit by integrating the high and junior high schools at the commencement of the 1959-1960 school term, and continuing and enlarging this program during the 1960-1961 school term.

Having pointed out the several infirmities in the administration of the laws relating to the enrollment, assignment and transfer of pupils by the defendant Board, and the many problems confronting the Board which made a fair administration of those laws difficult, there still remains the question as to the type of relief that should be afforded those plaintiffs who have exhausted their administrative remedies. Each of the plaintiffs were, without question, entitled to have their applications considered on their individual merits. The record clearly demonstrates that this was not done. All elementary students were denied reassignment by reason of a predetermined policy of the board not to integrate elementary schools. The record is not clear as to why applicants for transfer to junior high and high schools were denied. If there had been a scrupulous observance of the individual constitutional rights of the minor plaintiffs, many of them would have undoubtedly been entitled to a transfer. At the same time, by applying criteria and standards that have received judicial approval, the board would have likely been justified in denying many of the applications.

In considering the number of children attending the Durham public schools, both whites and Negroes, the overcrowded conditions in many of the schools, the several pending programs under way to alleviate some of these crowded conditions, the fact that most elementary children have been assigned to elementary schools nearest their home, the fact that applications were not considered on their individual merits according to criteria and standards applicable to white and Negro children alike, and other relevant factors, it is concluded that the most

equitable solution to the problem is to require the defendant Board to give separate, individual consideration to the application of each of the minor plaintiffs who have exhausted their administrative remedies, and then report to the court the action taken on each application. The court will thereafter enter such further orders as might be deemed appropriate.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties and of the subject matter.

2. The minor plaintiffs who attended either of the board hearings, or who were represented by one of their parents, or persons standing in *loco parentis*, (Findings of Fact Nos. 31 and 32) adequately exhausted their administrative remedies prior to the commencement of these actions, and are, therefore, entitled to be admitted to a school of their choice without regard to race or color.

3. The minor plaintiffs who did not attend either of the board hearings, or who were not represented by one of their parents, or persons standing in *loco parentis*, did not exhaust their administrative remedies prior to the commencement of these actions, and are, therefore, entitled to no relief.

4. These actions should not be considered as class actions, but rather actions by multiple plaintiffs seeking to enforce their individual constitutional rights.

The applications of each of the minor plaintiffs who exhausted their administrative remedies prior to the commencement of these actions are remanded to the defendant, Durham City Board of Education, with the following directions:

(a) Within ten days from the date thereof, the defendant Board shall meet and give separate consideration to the application for reassignment filed on behalf of each of the minor plaintiffs who exhausted their administrative remedies prior to the commencement of these actions. If additional information is desired of any of the minor plaintiffs or their parents, or persons standing in *loco parentis*, notice thereof, particularizing the exact information desired, shall immediately be furnished by registered mail, and each of the minor plaintiffs, or their parents, or persons standing in *loco parentis*, shall furnish such additional information within a period of five days thereafter.

(b) Within twenty-five days from the date hereof, the defendant Board shall render its decision with respect to each of said applications. Each decision shall be based on definite criteria and standards applicable to white and Negro children alike.

(c) Within thirty days from the date hereof, the defendant Board shall file with the court a report showing the action taken with respect to each of said applications. In each instance where the application is denied, the reason therefor shall be listed. Additionally, the board shall report to the court the criteria or standards used in considering the applications, any action it has taken with reference to the future use of dual attendance area maps, and any action taken with reference to notifying pupils and parents of initial assignments.

(d) At the time the report is filed with the court, the parents of each said plaintiffs shall also be notified of the action taken by the board.

These cases will be retained on the docket for such future action as may be deemed necessary or appropriate. In the event any of said minor plaintiffs are dissatisfied with the action of the defendant Board, and a hearing by the court is desired, application therefor shall be filed with the court within thirty days from the date notice is given of the action taken by the Board.

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1. Brown v. Board of Education, 347 U. S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954) and Brown v. Board of Education, 349 U. S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

EDUCATION
Public Schools—Tennessee (Lebanon)

Clifford Theodore SLOAN, et al. v. TENTH SCHOOL DISTRICT OF WILSON COUNTY, TENNESSEE, et al.

United States District Court, Middle District, Tennessee, Nashville Division, September 5 and 12, 1961, Civil Action No. 3107, _____F.Supp._____.

SUMMARY: Negro school children brought action in a federal district court seeking an order for the immediate desegregation of the Lebanon, Tennessee, schools and an injunction to restrain school district officials from refusing to admit plaintiffs to named elementary and high schools. The court granted a preliminary injunction as to the three elementary school pupils, but held in abeyance the application of the high school pupils. The boards in control of the districts involved were allowed thirty days to submit plans for desegregating the school systems.

MILLER, District Judge

ORDER

This cause came on to be heard this 5th day of September, 1961, before the Honorable William E. Miller, District Judge, upon the entire record and especially upon the show cause order heretofore issued by the Court against the original defendants in the cause and further upon the motions to dismiss filed by the defendant, City of Lebanon, Tennessee, and by the defendants, Charles H. Baird, Samuel F. Cook, Leon Jennings and Roy Dowdy, and upon the motion of plaintiffs for leave to file and serve their Amended and Supplemental Complaint and to add additional parties plaintiff and defendant in the cause, together with supporting affidavits filed with said motions, and after hearing statements and argument of counsel, the Court is of the opinion that the aforesaid motions should be disposed of as follows:

1. The motion to dismiss filed by the defendant, City of Lebanon, Tennessee, is sustained, on the basis of affidavit filed, and statement of counsel for said defendant, showing this defendant has no connection with the operation of public schools involved in this cause and has no interest therein. The cause is accordingly dismissed as to said defendant, City of Lebanon, Tennessee.

2. The motion of plaintiffs for leave to file and serve their Amended and Supplemental Complaint which adds additional parties plaintiff and defendant, is hereby allowed, and supplemental process is ordered to issue as to all new defendants named September 5, 1961, in said Amended and Supplemental Complaint and will be served on them immediately, together with a copy of this order. Copies of the motions of plaintiffs for temporary restraining order and for preliminary injunction filed simultaneously with said Amended and Supplemental Complaint will also be served on said defendants.

3. The motion of the defendants, Charles H. Baird, Samuel F. Cook, Leon Jennings and Roy Dowdy, is overruled, the plaintiffs having properly moved to be allowed to amend, and plaintiffs having further amended their original bill of complaint so as to properly name these said defendants, in their capacity, as the Commissioners or Directors of the Tenth School District of Wilson County, Tennessee and as Superintendent of said school district. The original process as to these defendants, Charles H. Baird, Samuel F. Cook, Leon Jennings and Roy Dowdy, will stand.

4. The entire cause is hereby set down for a pre-trial conference on Monday, September 11, 1961, at 9:00 A.M. and it is ORDERED that all parties, including those added by the Amended and Supplemental Complaint, appear before the Court in the United States District Courtroom at Nashville, Tennessee at said time and place. All parties, and especially the defendants, will be prepared to discuss the question of desegregating all public schools of the Tenth School District of Wilson County, Tennessee, and of the County School System of Wilson County, Tennessee, either immediately or according to such plan or plans as may be presented by said defendants. In addition, all parties will be prepared to suggest to the Court relevant

actions to be taken by the Court in desegregating two school systems.

5. At the conclusion of said pre-trial conference, the Court will allow a brief time, commensurate with the urgency of the case, to take such further action as may be indicated by the pre-trial conference.

6. All other questions are reserved.

ORDER

This cause came on to be heard this 11th day of September, 1961, upon a pre-trial conference as directed in the Court's order of September 5, 1961, and after discussion by the parties under the supervision of the Court, the Court being satisfied that the Wilson County Board of Education was made a party to the suit and process served on the members of the Board of Education on Thursday, September 7, 1961; upon application of counsel the Court is satisfied that said County Board should be allowed additional time before any order for desegregation is made upon it.

The Court however, is satisfied that upon the facts stated in the pleadings and brought out in the pre-trial conference, the minor plaintiffs, Clifford Theodore Sloan, Cordell Holland Sloan, Jr., and Ray Shockley, Jr. are entitled to immediate relief as against the defendant, Tenth School District Board, but that said Tenth School District Board should also be allowed additional time for filing a complete answer and desegregation plan.

It is therefore, ordered, adjudged and decreed that the writ of preliminary injunction and restraining order heretofore prayed by the plaintiffs, be granted to the extent hereinafter provided, and that the defendant, Tenth School District of Wilson County, Tennessee, its Board of Education, the defendants, Charles Howard Baird, Samuel F. Cook and Leon Jennings, and its defendants, Superintendent, Roy Dowdy, be and they are hereby enjoined and restrained, together with their servants, employees, agents and attorneys, from refusing to admit said three minor children to McClain Elementary School, in said School District, and said defendants, their employees, servants, agents and attorneys, are hereby directed to immediately allow the registration and entrance of said three named plaintiffs, Clifford Theodore Sloan, Cordell Holland Sloan, Jr., and Ray Schockley, Jr., at said McClain Elementary School.

The application of the other named plaintiffs for admission to the Lebanon High School of Wilson County, is for the present, held in abeyance by the Court and may be renewed at any time after the answers of the defendants have been filed.

All defendants are allowed additional time within which to file their answers and submit plans for desegregation of all the public schools of the Tenth School District of Wilson County, Tennessee, and of Wilson County, Tennessee, under the jurisdiction of the defendants herein.

It further appearing to the Court that the Sixteenth School District of Wilson County, Tennessee, also maintains, operates and controls racially segregated public schools in Wilson County, Tennessee; upon motion of the plaintiffs to be allowed to amend their Complaint so as to make said Sixteenth School District and its Board and Superintendent, parties to this suit said motion is hereby granted and process will be served on the members of the Board of said Sixteenth School District, and its Superintendent, J. H. Chumbley, and its Board of Education, J. B. Givan, Claude Roberts and Johnnie Durham, together with certified copies of this order. Said Sixteenth School District will also submit a plan for the desegregation of the public schools under its jurisdiction as provided herein.

All defendants are allowed thirty (30) days from date of this order within which to file their answers and desegregation plans, and the matter will be further heard on October 23, 1961, at 9:00 A.M. in the United States District Courtroom in Nashville, at which time all defendants, including those added by this order are directed to appear, and the Court will consider the desegregation plans submitted by the respective defendants, and all other matters.

It further appearing to the Court from the statements of counsel that defendant, Clyde Patton, is no longer a member of the Board of Education of Wilson County, Tennessee, but that Henry Oldfield has been elected to serve in his place, the said Henry Oldfield is hereby substituted as a defendant herein, but the Wilson County Board of Education being a party to this suit and represented by counsel, no further process will issue for the said Henry Oldfield.

All other matters are reserved.

EDUCATION
Public Schools—Texas

Hilda BORDERS, et al. v. Dr. Edwin L. RIPPY, et al.

United States District Court, Northern District, Texas, Dallas Division, June 27, 1961, Civil Action No. 6165, 195 F.Supp. 732.

SUMMARY: In a class action brought in a federal district court, Dallas County, Texas, Negro children sought a declaration of rights and injunctive relief ordering their admission to county schools on a nonsegregated basis. After extended litigation [see *Borders v. Rippy*, 2 Race Rel. L. Rep. 985 (1957); 4 Race Rel. L. Rep. 877 (1959)], in April, 1960, the board submitted a plan for grade-a-year desegregation with a liberal system of transfers. On hearing, the court suggested that it would approve a plan whereby three classes of schools would be set up —one for Negroes, one for whites, and one for those wanting integration. The board submitted such a plan, which was approved by the court. 5 Race Rel. L. Rep. 679 (1960). On appeal, the Fifth Circuit Court of Appeals reversed, holding that the court-approved system of three classes of schools was based on a misconception of the nature of the constitutional rights asserted by the plaintiffs. The board's original grade-a-year plan was ordered reinstated, but the court of appeals specifically refused to approve the twelve-year plan insofar as it postponed full integration, since the district judge had not ruled on whether that much time was necessary. In a supplemental opinion, the court cast doubt on the constitutionality of the use of racial criteria in making pupil transfers. *Boson v. Rippy*, 5 Race Rel. L. Rep. 1048 (1960).

On remand, the district court, acting under the court of appeals mandate, ordered the grade-a-year plan to be put into operation in September, 1961, but struck from the board's suggested plan the paragraph permitting the use of racial criteria in making pupil transfers.

DAVIDSON, District Judge.

ORDER

It appearing to this Court that the United States Court of Appeals for the Fifth Circuit has held that the Defendant Board of Education "has a wide discretion in transferring pupils from school to school" and that "by virtue of its authority to administer and supervise the public schools, the Defendant Board might provide for the assignment of pupils to particular schools upon any reasonable and legitimate basis," and has held that Article 2901a, Sec. 4, Vernon's Texas Civil Statutes, is constitutional on its face, and should be available for exercise by said Board in order that the law governing the Dallas School District not be "different from that applicable to other public schools in the State of Texas";

And it appearing to the Court that, subject to said general transfer authority and said statutory provisions, the United States Court of Appeals has directed that this Court approve Desegregation Plan No. 1, as amended, with paragraph 6 thereof eliminated, the provisions of said Desegregation Plan No. 1, as amended, with paragraph 6 thereof eliminated, being as follows:

"2. Compulsory segregation based upon race is abolished in Grade One of the elementary schools of the Dallas Independent School District for the scholastic year beginning in September, 1961; and each succeeding September, beginning in September, 1962, the next succeeding Grade will be desegregated until all twelve grades in the complete schools have been desegregated.

"3. A plan of school zoning or districting based upon location of school buildings and the latest scholastic census without reference to race will be established for the administration of the First Grade and for other grades as hereafter desegregated.

"4. Every student entering the First Grade in September 1961, will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may be necessary in particular instances.

"5. Applications for transfer of first-grade students from the school of their zone to

another school will be given careful consideration and will be granted when made in writing by parents or guardians or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable, consistent with sound school administration."

IT IS THEREFORE ORDERED by this Court, in compliance with the decree and mandate of the United States Court of Appeals for the Fifth Circuit, that the Board of Education be permitted to exercise its general transfer authority, and to exercise the transfer authority granted by said Article 2901a, Sec. 4, Vernon's Texas Civil Statutes, and, subject thereto, that said Desegregation Plan No. 1, as amended, and with paragraph 6 eliminated, be and it is hereby approved and ORDERED into effect to the extent that it does not conflict with the said general transfer authority and the transfer authority granted by said Article 2901a, Sec. 4, Vernons' Texas Civil Statutes;

And it is further ORDERED AND DIRECTED by this Court that in the administration of the schools the Board's rights of transfer shall not be used so as to effect any discrimination between the races;

And, to the end that the Plan approved by the Court of Appeals may be successfully and peaceably put into effect, this Court calls upon the community of Dallas to support and cooperate with the Board of Education in its efforts to carry out this order.

IT IS FURTHER ORDERED that this Court retains jurisdiction of this cause for the entry of any further orders or decrees which this Court may find necessary and proper.

This the 27 day of June, A. D. 1961. In obedience to the mandate of the Court Appeals.

District Court Opinion

We are here now faced with the mandate of the Appellate Court directing us to enter a decree setting aside the plans of the School Board of Dallas which gave the child and the parents the right of choice along with integration and instead to enter a decree of forcible integration in disregard of the schools' plans and the constitution and laws of Texas.

Should a judge act when his conscience says no and where every sense of right and fair play says no, or should he under such conditions hold himself disqualified?

To abolish a long established social status or educational system by force is un-American. Such may be amicably done only by consent of the parties affected. The Court's decree may take effect through the office of the United States Marshal or with the soldier's bayonet, it is force just the same.

The people of Dallas by 4 to 1 majority vote stand for segregation. They have integration now not by consent, not by choice, but by force. If the medicine is bad and the result the same, what matters it to those concerned if it is given in twelve doses instead of one?

In a case as recently decided as December 8, 1960, Mallery, Judge, Wash., 357 P.2d 702, 703, in the Price v. Evergreen Cemetery Company, it said:

> "This case is more significant for what it reveals, than for what it decides. It reveals an ultimate aspiration of the Negro race, • • •
>
> "This case demonstrates that the Negro desegregation program is not limited to public affairs. The right of white people to enjoy a choice of associates in their private lives is marked for extinction by the N.A.A.C.P. Compulsory total togetherness of Negroes and whites is to be achieved by judicial decrees in a series of Negro court actions."

This unhappy controversy is not of our making. Our white people assuredly did not seek it. Our Negro friends and citizens did not start it. It is here, here by remote origin and control, one of many suits brought throughout the South. The man from afar understands not our problems as do we. Our slogan hath ever been rule by consent of the governed. Our founding fathers could and would have solved this problem without bitterness. To them local self-government was a complete answer. They could cheerfully observe the rule they had helped to make.

Our laws are not unilateral in their operation. Where the colored child may be embarrassed and given an inferiority complex by not being allowed to sit in white classes in the school room, then in the same school room the white child through the same psychological process may be found also subject to inferiority complex by reasons of being required by force to sit in

classes which neither she nor her parents desired. The rights of the one are equal to the rights of the other.

Our colored neighbor is not unlike his white brother in the love of authority and the exercise of power. We have in our land a chain of black belt counties reaching from the Potomac to the Brazos in which the blacks hold a majority vote. The denial of the right to rule or the failure of the duty to rule well will in a future day rise to a national controversy. The N.A.A.C.P. will have every reason to be in that controversy and fight that it now has in this.

When state lines are abandoned for one purpose they are broken for all purposes. We cease to be a nation of federated states but a solidified whole.

The right to local self-government is everywhere a right of free men. Crush to earth, 'twill rise again, for 'tis an inseparable part of freedom itself.

The late Justice Brandeis once declared: The most comprehensive and valued right of man is to be let alone. Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944. Dallas is not being let alone. Her school system is not being let alone. The laws and constitution are not being let alone but are all changed without the consent of those who must live under them.

Movement towards social and economic equality is towards a sameness of existence. The closer we come to what people call "one" the nearer we are to the end beyond which the excellence of achievement halts at a dead eddy.

Never have we at any time entertained one unkind thought toward the colored race. My wet nurse as a child was a Negro woman. My playfellows were often her children. She was good to me. I would not hold back her race but would give them equal opportunity with any other race in matters of choice. I would not hold them back. I would say to the colored child as I would say to the white child, hitch your wagon to a star and rise. Yes rise, rise by the course of excellence and superiority of achievement, and not by force.

Our Constitution was written to forestall unhappy conditions as that which now confronts us. When the Constitution was submitted to the several states for ratification an almost uniform protest went up from the states because it did not contain a bill of rights. Such was especially true in the states of Virginia, New York and North Carolina. The great oratorical powers of Patrick Henry seconded by the outstanding voice of George Mason almost defeated ratification in Virginia. The vote stood 189 to 179. Madison who was pushing the ratification had the backing of Washington else he would have lost. And then to succeed he promised the convention that every effort would be made to amend the Constitution with a bill of rights, and such was true of North Carolina and other states. In fact, North Carolina refused to ratify at all until the amendments were added.

When the Constitution was ratified and most of the states had asked for the adoption of a bill of rights as an amendment thereto, it is worthy of note that the first item in the proposed bill of rights coming up from each state dealt with the rights of the state of local control in language like this:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Nowhere in the Constitution is the matter of education delegated to the Federal government. Our late President Franklin D. Roosevelt, though liberal as he was in thought, declared: "All powers not expressly delegated to the national government still belong to the states."

The Constitution is the compass, the rudder and the anchor of the ship of state. Without it comes tryanny or chaos. It is the citadel of the rights of free men. It must be preserved, it must be preserved as written.

The oath to uphold and defend the Constitution is made a duty of every judge of every court. The decree here entered is one of that line of decisions leveling and annulling constitutional limitation on arbitrary powers of government. It bypasses Article X of the Bill of Rights as though it had never been written. History will mark this as an epoch in the lives of the American people and particularly so as a rift in the judicial powers of our nation. Though we sign the decree as required by the mandate of our higher court, so deeply do we feel the effects upon the future we must let the record show that at least one judge would dissent.

One final word to the people of Dallas: Stand calmly by constituted authority.

To the colored man, you are fully aware of having won in the courts of the land a history-making legal battle. If it calls for a triumph,

remember the precept of General Grant at Appomattox: "Never crow over the reverses of an honorable adversary." In our courts your lawyers will tell you never to provoke a difficulty. Sound ethics and good manners tell us not to unnecessarily provoke the ill will of those with whom we live. In this long continued trial your lawyers and your people have conducted themselves with that courteous decorum which commands the respect of the United States Court and the public. It well behooves you to help avoid such untoward scenes and conditions as have prevailed in other cities.

To the white man we would say that while every decision rendered by a Court does not become the law of the land yet if the judgement so rendered puts in motion edicts of the law and agencies of government, do not, though you disapprove, resort to violence in any form. It injures your cause. It does harm and subjects you to ultimate defeat and humiliation. Let the admonition of George Washington in his farewell address be your guide:

> "Towards the preservation of government and the permanency of state it is requested that you discountenance irregular opposition to acknowledged authority."

EDUCATION

Public Schools—Virginia (Prince Edward County)

Eva ALLEN, et al. v. COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, Virginia, etc., et al.

United States District Court, Eastern District, Virginia, Richmond Division, August 25, 1961, Civil Action No. 1333, _____ F. Supp. _____.

SUMMARY: Following the return of one of the original *School Segregation Cases* [1 Race Rel. L. Rep. 5, 11 (1954) and (1955)] from the United States Supreme Court to the federal district court in Virginia, a three-judge district court entered a decree requiring the admission of Negro children to schools in Prince Edward County without discrimination on the basis of race, and with all deliberate speed. 1 Race Rel. L. Rep. 82 (1955). A long course of litigation ensued, culminating in the county's action of closing all of its public schools. See 1 Race Rel. L. Rep. 1055 (1956); 2 Race Rel. L. Rep. 341, 1119 (1957); 3 Race Rel. L. Rep. 964 (1958); 4 Race Rel. L. Rep. 256, 297, 538 (1959); 5 Race Rel. L. Rep. 412 (1960); 6 Race Rel. L. Rep. 432 (1961).

Plaintiffs then brought this action in federal district court seeking a determination as to whether the county could close its public school system, and whether defendants had attempted to circumvent the court's prior order enjoining continued discrimination in the county high schools. The Virginia constitution provides that the state shall maintain public schools throughout the state, but defendants contended that the schools are actually owned and operated locally. The court found that state law may compel the maintenance of a public school system, but that a decision on this question would require an interpretation of Virginia statutes. It therefore held that it should defer any ruling upon this question until the Virginia courts had made their own determination, since the parties had indicated that a suit would be instituted in the state courts for this purpose.

After the closing of the public schools, a local private all-white school system had been organized. The County Board of Supervisors adopted ordinances providing for grants-in-aid to students attending approved schools, and tax credits for contributors to local private schools. The court held these ordinances unlawful in that they were being used to accomplish the unlawful end of circumventing the prior injunction against continued racial discrimination in the county's high schools. The board was therefore enjoined from paying

out any grant-in-aid funds or allowing any tax credits while the county schools remained closed. The school superintendent was enjoined from approving any applications for state scholarship grants under a state law, that law being construed to apply only where a "freedom of choice" existed between public and private schooling. The board and the superintendent were further ordered to prepare plans now for desegregation of the county's elementary schools when and if they are reopened.

LEWIS, District Judge.

MEMORANDUM OPINION

The issues raised, in this phase of the Prince Edward County school case, are:

Whether or not Prince Edward County can close and refuse to maintain its heretofore existing free public school system in order to avoid the racial discrimination prohibited by the Supreme Court of the United States, in Brown v. Board of Education, 347 U.S. 483; 349 U.S. 294; and

Whether or not the defendants, individually or in concert, have deliberately circumvented or attempted to circumvent or frustrate the order of this Court entered herein on the 22nd day of April, 1960.

In order to properly answer these questions it is necessary and appropriate to briefly review the history of this litigation.

This suit was originally instituted in 1951, and sought to enjoin the enforcement of the provisions of the Virginia Constitution and Code[1] which required the segregation of Negroes and whites in public schools. After years of litigation, the basic question raised therein was presented to the Supreme Court of the United States and was decided in a consolidated hearing, styled Brown v. Board of Education, 347 U.S. 483. The holding in that case was:

> "The Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property." Cooper v. Aaron, 358 U.S. 1.

Thus the provisions of the Virginia Constitution and Code referred to were declared unconstitutional and void.

That this decision was unpopular in most of the South, is understating the fact. Most of the southern states, including Virginia, adopted new laws in order to meet the situation thus created. Many of these new laws were declared unconstitutional, both by the federal and state courts.[2]

In compliance with the Brown decision, supra, this court entered an order enjoining the defendants from discriminating against the plaintiffs in admission to the public schools of Prince Edward County solely on account of race, and further directed the defendants to proceed promptly with the formulation of a plan to comply therewith, commencing with the opening of the school year 1965.

The Court of Appeals for the Fourth Circuit, under date of May 5, 1959, reversed this Court and remanded the case with directions to issue an order in accordance with that opinion, which provided, among other things, that the defendants be enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and to take immediate steps in this regard to the end that the applications be considered so as to permit the entrance of qualified persons into the white schools in the school term beginning September 1959. No decree was entered pursuant to the mandate of the Court of Appeals until the petitioners presented an appropriate order for entry therein on April 22, 1960, pertinent portions of said order being:

> "The defendants are restrained and enjoined from any action that regulates or affects on the basis of race or color the admission, enrollment or education of the infant plaintiffs, or any other Negro children similarly situated, to the high schools operated by the defendants in the County and that the defendants receive and consider the applications of such persons for admission to such high schools without regard to race or color.

1. Virginia Constitution, Section 140, Code 22-221, 1950.

2. Harrison v. Day, 106 S.E. 2d 636; James v. Almond, 170 Fed. Supp. 331; Cooper v. Aaron, 358 U.S. 1; Bush v. Orleans Parish School Board, 191 Fed. Supp. 875.

"That the defendants make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day."

This Court and all counsel of record had knowledge of the fact that the public schools of Prince Edward County were closed prior to the entry of the said order.

The Board of Supervisors of Prince Edward County, anticipating the aforesaid decision of the Court of Appeals for the Fourth Circuit, refused to levy any taxes or appropriate any money for the maintenance of the public schools during the school year 1959-60, resulting in the closing thereof.

This action was in accord with the expressed policy of the Board of Supervisors (adopted in May 1956) to abandon public schools and educate the children in some other way if that be necessary to preserve separation of the races in the schools of Prince Edward County.[3]

All public schools in Prince Edward County have remained closed from that date to the present time and apparently will so remain until this or some state court directs that they be opened and maintained. Unfortunately, as a result thereof, all of the children of Prince Edward County, both white and colored, have been deprived of a public education since June 1959. In fact, none of the approximately 1800 colored children have received any formal education since that date. Nearly all of the 1500 white children have been attending private schools, operated by the Prince Edward School Foundation.

Under these circumstances should this Court enter an order directing the appropriate officials of Prince Edward County to reopen and maintain its public schools?

Section 129 of the Constitution of Virginia provides:

"Free schools to be maintained. — The General Assembly shall establish and maintain an efficient system of public free schools throughout the State."

The Supreme Court of Appeals of Virginia, in Harrison v. Day, 106 S.E. 2d 636, held that Section 129 of the Virginia Constitution is still in the organic law (of Virginia) and must be complied with. The Court further stated in its opinion:

"that Section 129 requires the state to maintain an efficient system of public free schools throughout the State. That means that the State must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be."

Therefore it would appear from this decision that the Supreme Court of Appeals of Virginia has determined that public schools must be maintained in Prince Edward County, Virginia.

However, the defendants earnestly contend that the public schools in Virginia are not now and never have been operated by the state or by any state agency; that they are now and always have been owned, operated, managed and controlled by local (that is, county or city) school boards. The defendants further contend that other sections of the Virginia Constitution and certain statutes made pursuant thereto must be considered and construed in order to determine this question.

Counsel for the plaintiffs contend it is not necessary for this Court or the Supreme Court of Appeals of Virginia to further construe and/or pass upon the validity of any sections of the Virginia Constitution or statutes made pursuant thereto in order to properly decide this isuue. They contend the closing of the public schools in Prince Edward County, while maintaining public schools in every other city and county in the state, violates the Fourteenth Amendment to the Federal Constitution, and cite James v. Almond, 170 Fed. Supp. 331, in support thereof:

"While the State of Virginia, directly or indirectly, maintains and operates a school system with the use of public funds, or participates by arrangement or otherwise, in the management of such a school system, no one public school or grade in Virginia may be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the state permits other public schools or grades to remain open at the expense of the taxpayers. In so holding we have considered only the Constitution of

3. See plaintiffs' Exhibit #2.

the United States as it is unnecessary, in our opinion, to pass upon the specific provisions of the Constitution of Virginia which deals directly with the free public school system of the state. We do not suggest that, aside from the Constitution of Virginia, the state must maintain a public school system. That is a matter for state determination. We merely point out that the closing of a public school, or grade therein, for the reasons heretofore assigned violates the right of a citizen to equal protection of the laws and, as to any child willing to attend a school with a member or members of the opposite race, such a school-closing is a deprivation of due process of law."

Whether the State of Virginia or the County of Prince Edward, technically speaking, owns and operates the public schools is of no concern to the children who are being deprived of free public education. The question that must and should be judicially determined is: Can the public schools, heretofore maintained in Prince Edward County, be closed in order to avoid the racial discrimination prohibited by the Fourteenth Amendment?

Since the final answer to that question requires the interpretation of perhaps several sections of the Virginia Constitution and statutes adopted pursuant thereto, federal abstinence is the proper procedure.

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a scrupulous regard for the rightful independence of state governments should at all times actuate the federal courts, Matthews v Rodgers, 284 U.S. 521, 525, as their contribution in furthering the harmonious relation between state and federal authority. Railroad Comm'r. v. Pullman Co., 312 U.S. 496." Harrison v. NAACP, 360 U.S. 167.

Counsel for all parties having indicated that an appropriate suit would be forthwith instituted in the Virginia state courts, this Court will defer its ruling on this question until the Supreme Court of Appeals of Virginia has rendered its decision, provided the said suit is filed within sixty days from this date.

Having thus disposed of the first question before the Court, and now turning to the second question, it is likewise necessary and proper to briefly review what has transpired in Prince Edward County subsequent to January 1, 1959. The record thus made is as follows:

The County Board of Supervisors of Prince Edward County, anticipating the May 5, 1959, decision of the Court of Appeals for the Fourth Circuit, failed or refused to make any funds available to the Prince Edward School Board for the fiscal and school years 1959-60, 1960-61 and 1961-62.

No public schools have been operated in the County since June 1959.

On May 16, 1959, certain private citizens obtained a charter for the Prince Edward School Foundation in order that private schools would be available for white children.

Such private schools were conducted during the school year 1959-60 for white children only; no tuition was charged; these schools were supported by private contributions.

For the school year 1960-61, the Prince Edward School Foundation charged a tuition of $240.00 for its elementary students and $265.00 for its high school students.

On July 18, 1960, the Board of Supervisors of Prince Edward County adopted an ordinance providing for $100.00 grants in aid of the education of any Prince Edward County child whose parent or guardian applied therefor, who attended or proposed to attend a school that met the requirements of the ordinance.[4]

The Board of Supervisors adopted, on the same date, an ordinance providing for a tax credit, not to exceed 25% of the total county real and personal property taxes for contributions made to private nonprofit nonsectarian schools located within Prince Edward County.[5]

During the school year 1960-61, thirteen hundred twenty-seven white students enrolled in the schools being operated by the Prince Edward School Foundation, obtained state and county tuition grants, totaling $225.00 for each elementary student and $250.00 for each high school student.

During the school year 1960-61, the Prince Edward School Foundation received private contributions in the amount of $200,000.00 which were credited to its building fund, its library fund and its operating fund.

4. See plaintiffs' Exhibit #15.
5. See plaintiffs' Exhibit #16.

The Treasurer of Prince Edward County credited as payments on account of county tax bills the sum of approximately $56,000.00, all of which was contributed to the Prince Edward School Foundation.

During both the 1959-60 and 1960-61 school years practically all the white school teachers who formerly taught in the public school system in Prince Edward County were employed as teachers by the Prince Edward School Foundation.

During the 1960-61 school year the Prince Edward School Foundation schools were accredited by the State Board of Education.

In 1960-61, the sum of $39,360.00 was received by Prince Edward County, from the State of Virginia as its share of the State Constitutional School Fund. These so-called constitutional funds were neither requested nor received by Prince Edward County during the school year 1959-60. This money was used by the School Board for the payment of debt service charges, repairs and upkeep of school buildings and grounds, fire insurance and other fixed charges and administration costs.

Five Negro children residing in Prince Edward County applied for and received state and county tuition grants for attending public schools elsewhere in Virginia.

The Prince Edward County Christian Association, a Negro association, conducted training centers for Negro children beginning in the late fall of 1959. These centers do not meet the requirements for either state or county tuition grants.

Approximately one-third of the Negro school children of Prince Edward County attended these training centers. The other Negro school children of Prince Edward County have not received any schooling or training of any kind since the closing of the public schools.

By the adoption of these County ordinances, and the payment of the State tuition grants during the time the schools of Prince Edward County were closed, have any of the defendants circumvented or attempted to circumvent or frustrate the anticipated order of this Court, entered pursuant to the mandate of the Court of Appeals?

We think they have.

"The basic decision in Brown v. Board of Education was unanimously reached by the Supreme Court of the United States. Since the first Brown opinion three new Justices have come to the court. They are at one with the Justices still on the court, who participated in that basic decision, as to its correctness and that decision is now unanimously re-affirmed." * * *

"The principles announced in that decision and the obedience of the state to them, according to the command of the Constitution are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us." Cooper v. Aaron, 358 U.S. 1.

"In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' (Smith v. Texas, 311 U.S. 128, 132.)" Cooper v. Aaron, 358, U.S. 1.

Without questioning the purpose or motives of the members of the Board of Supervisors of Prince Edward County, the end result of every action taken by that body was designed to preserve separation of the races in the schools of Prince Edward County.

"When a State[6] exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right. This principle has had many applications. It has long been recognized in cases which have prohibited a State from exploiting a power acknowledged to be absolute in an insolated context to justify the imposition of an 'unconstitutional condition.' What the Court has said in those cases is equally applicable here, viz., that 'Acts generally lawful may become unlawful when done to accomplish an unlawful end, (United States v. Reading Co., 226 U.S. 324, 357.)'" Gomillion v. Lightfoot, 364 U.S. 339.

Approximately $132,000.00 from general tax funds were paid to those residents of Prince

6. Prince Edward County is likewise limited by this rule of law.

Edward County who sent their children to schools maintained by the Prince Edward School Foundation, (a segregated white school). An additional $56,000.00 of tax revenue, in the form of tax credits, was used for this purpose. Like aid was not available to the colored residents of Prince Edward County, for the obvious reason there was no private colored school in existence. By closing the public schools, the Board of Supervisors have effectively deprived the citizens of Prince Edward County with a freedom of choice between public and private education. County tax funds have been appropriated (in the guise of tuition grants and tax credits) to aid segregated schooling in Prince Edward County.

That, to say the least, is circumventing a constitutionally protected right.

We do not hold these County ordinances [7] are facially unlawful. We only hold they become unlawful when used to accomplish an unlawful end, (the perpetuation of segregated schooling in Prince Edward County).

Therefore an order will be entered herein restraining and enjoining the members of the Board of Supervisors of Prince Edward County, the County Treasurer and their respective agents and employees from approving and paying out any county funds purportedly authorized by the so-called "grant in aid" ordinance, adopted July 18, 1960, and from allowing any tax credits purportedly authorized by the so-called "tax credit" ordinance, adopted July 18, 1960, during such time the public schools of Prince Edward County remain closed.

We are next confronted with the question of the lawfulness of the payment of state tuition grants to residents of Prince Edward County during the time public schools are closed.

The policy of the Commonwealth of Virginia as enunciated in Section 22-115.29 of the Code of Virginia, is as follows:

> "The General Assembly, mindful of the need for a literate and informed citizenry, and being desirous of advancing the cause of education generally, hereby declares that it is the policy of this Commonwealth to encourage the education of all of the children of Virginia. In furtherance of this objective, and to afford each individual freedom in choosing public or private schooling, the General Assembly finds that it is desirable and in the public interest that scholarships should be provided from the public funds of the state for the education of the children in nonsectarian private schools in or outside, and in public schools located outside, the locality where the children reside; and that counties, cities and towns, if the town be a separate school district approved for operation, should be authorized to levy taxes and appropriate public funds to provide for such scholarships. (1960, c.448.)"

Thus a "freedom of choice" between public and private schooling is clearly contemplated.

That the state did not intend its "scholarships" would be available in communities without public schools is best evidenced by reference to the regulation of the State Board of Education governing public scholarships.[8] This rule reads as follows:

> "Scholarships will be available for pupils of legal school age who are eligible to attend the public schools in the county, city or town in which the parent, guardian or such other person standing in loco parentis is a bona fide resident."

This rule is plain and unequivocal. State scholarships are not available to persons residing in counties that have abandoned public schools.

An order will therefore be entered restraining and enjoining the County Superintendent of Prince Edward County, the Superintendent of Public Instruction, their agents and employees, and all persons working in concert with them, from receiving, processing or approving any applications for state scholarship grants from persons residing in Prince Edward County so long as the public schools of Prince Edward County remain closed.

The order of April 20, 1960, provides, among other things:

> "That the defendants (County Superintendent and School Board) make plans for the admission of pupils in the elementary schools of the County without regard to race or color and to receive and consider applications to this end at the earliest practical day."

That no such plans have been made is admit-

7. Eduational Grant in aid ordinance adopted July 18, 1960; Tax credit ordinance adopted July 18, 1960.

8. See plaintiffs' Exhibit #20.

ted. The defendants justify their failure to comply with the plain language of this order by stating they acted on advice of counsel and that it appeared useless to make such plans so long as the public schools of the County were closed.

This Court cannot accept these reasons as justification for failing to comply with this portion of the order. Therefore the defendants are herewith directed to forthwith proceed with the preparation of such plans, so that they may be readily available when and if the public schools of Prince Edward County are reopened. The defendants should advise the Court in writing of the progress made on or before November 15, 1961.

There is no evidence the School Board of Prince Edward County has leased or transferred or intends to lease or transfer any school property. The prayer for injunctive relief is therefore denied.

Counsel for the plaintiffs should prepare an appropriate order in accordance with this opinion, and submit the same to counsel for defendants for approval, and it will be entered accordingly, effective this date. Costs will be assessed against the defendants.

EDUCATION
Colleges and Universities, Sit-ins—Alabama

St. John DIXON, et al. v. ALABAMA STATE BOARD OF EDUCATION, et al.

United States Court of Appeals, Fifth Circuit, August 4, 1961, No. 18641, 294 F.2d 150.

SUMMARY: Invoking general federal question and Civil Rights Act jurisdiction, six former students of the Alabama State College for Negroes brought an action in federal court to enjoin the state board of education from interfering with their right to attend the college. Plaintiffs alleged that, without notice or opportunity to defend against charges, they had been expelled from the college by the board, without regard to any valid rule about student conduct, for the purpose of punishing and intimidating them for having participated in a sit-in demonstration at a publicly-owned lunchroom in the county courthouse in Montgomery, and that such action was arbitrary and in violation of their constitutional rights. The district court dismissed the action, holding that procedural due process concepts do not require public school authorities to make formal charges or hold formal hearings prior to expulsion. 5 Race Rel. L. Rep. 723 (1960).

The Fifth Circuit Court of Appeals reversed, holding that procedural due process "requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct," and that plaintiffs had been given none. It was further held that this right could not be waived through a provision in the regulations of the state board of education, as might be done by private institutions. For the future guidance of the parties the court also stated its views on the nature of the notice and hearing required by due process.

Before RIVES, CAMERON and WISDOM, Circuit Judges.

RIVES, Circuit Judge.

The question presented by the pleadings and evidence,[1] and decisive of this appeal, is whether due process requires notice and some opportunity for hearing before students at a tax-supported college are expelled for misconduct. We answer that question in the affirmative.

1. The complaint alleges that "Defendant Trenholm on March 4, 1960, notified plaintiffs of their expulsion effective March 5. 1960, without any notice, hearing, or appeal," and further avers:

"Expulsion from Alabama State College came without warning, notice of charges, opportunity to appear before defendants or at any other hearing, opportunity to offer testimony in defense, cross-examination of accusers, appeal, or other opportunity to defend plaintiffs' right not to be arbitrarily expelled from defendant College. Defendants' expulsion order, issued by the defendants functioning under the statutes, laws and regulations of the State of Alabama, thereby deprived plaintiffs of rights protected by the due process clause of the Four-

The misconduct for which the students were expelled has never been definitely specified. Defendant Trenholm, the President of the College, testified that he did not know why the plaintiffs and three additional students were expelled and twenty other students were placed on probation. The notice of expulsion[2] which Dr. Trenholm mailed to each of the plaintiffs assigned no specific ground for expulsion, but referred in general terms to "this problem of Alabama State College."

The acts of the students considered by the State Board of Education before it ordered their expulsion are described in the opinion of the district court reported in 186 F.Supp. 945, from which we quote in the margin.[3]

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teenth Amendment to the United States Constitution."

To this averment the defendants respond:

". . . that the facts set forth in plaintiffs' complaint show no violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; that plaintiffs have no constitutional right to attend Alabama State College; that the facts stated by plaintiffs in their complaint show that this Court is without jurisdiction for no arbitrary action is alleged except as conclusions unsupported by the facts alleged; that the defendants determined in good faith and within their authority as the governing authorities of Alabama State College that the expulsions of the plaintiffs were for the best interests of the college and based upon undisputed conduct of plaintiffs while students at said college."

As will appear later in this opinion, the issue thus squarely presented by the pleadings was fully developed in evidence.

2. Letter from Alabama State College, Montgomery, Alabama, dated March 4, 1960, signed by H. Councill Trenholm, President:

"Dear Sir:

This communication is the official notification of your expulsion from Alabama State College as of the end of the 1960 Winter Quarter.

"As reported through the various news media, The State Board of Education considered this problem of Alabama State College at its meeting on this past Wednesday afternoon. You were one of the students involved in this expulsion-directive by the State Board of Education. I was directed to proceed accordingly.

"On Friday of last week, I had made the recommendation that any subsequently-confirmed action would not be effective until the close of this 1960 Winter Quarter so that each student could thus have the opportunity to take this quarter's examinations and to qualify for as much OH-Pt credit as possible for the 1960 Winter Quarter.

"The State Board of Education, which is made responsible for the supervision of the six higher institutions at Montgomery, Normal, Florence, Jacksonville, Livingston, and Troy (each of the other three institutions at Tuscaloosa, Auburn and Montevallo having separate boards) includes the following in its regulations (as carried in page 32 of The 1958-59 Registration-Announcement of Alabama State College):

"'Pupils may be expelled from any of the Colleges:

"'a. For willful disobedience to the rules and regulations established for the conduct of the schools.

"'b. For willful and continued neglect of studies and continued failure to maintain the standards of efficiency required by the rules and regulations.

"'c. FOR CONDUCT PREJUDICIAL TO THE SCHOOL AND FOR CONDUCT UNBECOMING A STUDENT OR FUTURE TEACHER IN SCHOOLS OF ALABAMA, FOR INSUBORDINATION AND INSURRECTION, OR FOR INCITING OTHER PUPILS TO LIKE CONDUCT.

"'d. For any conduct involving moral turpitude.'" In the notice received by each of the students paragraph "c" just quoted, was capitalized.

3. "On the 25th day of February, 1960, the six plaintiffs in this case were students in good standing at the Alabama State College for Negroes in Montgomery, Alabama. . . . On this date, approximately twenty-nine Negro students, including these six plaintiffs, according to a prearranged plan, entered as a group a publicly owned lunch grill located in the basement of the county Courthouse in Montgomery, Alabama, and asked to be served. Service was refused; the lunchroom was closed; the Negroes refused to leave; police authorities were summoned; and the Negroes were ordered outside where they remained in the corridor of the Courthouse for approximately one hour. On the same date, John Patterson, as Governor of the State of Alabama and as chairman of the State Board of Education, conferred with Dr. Trenholm, a Negro educator and president of the Alabama State College, concerning this activity on the part of some of the students. Dr. Trenholm was advised by the Governor that the incident should be investigated, and that if he were in the president's position he would consider expulsion and/or other appropriate disciplinary action. On February 26, 1960, several hundred Negro students from the Alabama State College, including several if not all of these plaintiffs, staged a mass attendance at a trial being held in the Montgomery County Courthouse, involving the perjury prosecution of a fellow student. After the trial these students filed two by two from the Courthouse and marched through the city approximately two miles back to the college. On February 27, 1960, several hundred Negro students from this school, including several if not all of the plaintiffs in this case, staged mass demonstrations in Montgomery and Tuskegee, Alabama. On this same date, Dr. Trenholm advised all of the student body that these demonstrations and meetings were disrupting the orderly conduct of the business at the college and were affecting the work of other students, as well as work of the participating students. Dr. Trenholm personally warned plaintiffs Bernard Lee, Joseph Peterson and Elroy Embry, to cease these disruptive demonstrations immediately, and advised the members of the student body at the Alabama State College to behave themselves and return to their classes. . . .

"On or about March 1, 1960, approximately six hundred students of the Alabama State College engaged in hymn singing and speech making on the steps of the State Capitol. Plaintiff Bernard Lee addressed students at this demonstration, and the demonstration was attended by several if not all of the plaintiffs. Plaintiff Bernard Lee at this time called on the students to strike and boycott the college if any students were expelled because of these demonstrations."

As shown by the findings of the district court, just quoted in footnote 3, the only demonstration which the evidence showed that *all* of the expelled students took part in was that in the lunch grill located in the basement of the Montgomery County Courthouse. The other demonstrations were found to be attended "by several if not all of the plaintiffs." We have carefully read and studied the record, and agree with the district court that the evidence does not affirmatively show that *all* of the plaintiffs were present at any but the one demonstration.

Only one member of the State Board of Education assigned the demonstration attended by all of the plaintiffs as the sole basis for his vote to expel them. Mr. Harry Ayers testified:

> "Q. Mr. Ayers, did you vote to expel these negro students because they went to the Court House and asked to be served at the white lunch counter?
> "A. No, I voted because they violated a law of Alabama.
> "Q. What law of Alabama had they violated?
> "A. That separating of the races in public places of that kind.
> "Q. And the fact that they went up there and requested service, by violating the Alabama law, then you voted to have them expelled?
> "A. Yes.
> "Q. And that is your reason why you voted?
> "A. That is the reason."

The most elaborate grounds for expulsion were assigned in the testimony of Governor Patterson:

> "Q. There is an allegation in the complaint, Governor, that—I believe it is paragraph six, the defendants' action of expulsion was taken without regard to any valid rule or regulation concerning student conduct and merely retaliated against, punished, and sought to intimidate plaintiffs for having lawfully sought service in a publicly owned lunch room with service; is that statement true or false?
> "A. Well, that is not true; the action taken by the State Board of Education was—was taken to prevent—to prevent incidents happening by students at the College that would bring—bring discredit upon—upon the School and be prejudicial to the School, and the State—as I said before, the State Board of Education took—considered at the time it expelled these students several incidents, one at the Court House at the lunch room demonstration, the one the next day at the trial of this student, the marching on the steps of the State Capitol, and also this rally held at the church, where—where it was reported that—that statements were made against the administration of the School. In addition to that, the—the feeling going around in the community here due to—due to the reports of these incidents of the students, by the students, and due to reports of incidents occurring involving violence in other States, which happened prior to these things starting here in Alabama, all of these things were discussed by the State Board of Education prior to the taking of the action that they did on March 2, and as I was present and acting as Chairman, as a member of the Board, I voted to expel these students and to put these others on probation because I felt that that was what was in the best interest of the College. And the—I felt that the action should be—should be prompt and immediate, because if something—something had not been done, in my opinion, it would have resulted in violence and disorder, and that we wanted to prevent, and we felt that we had a duty to the —to the—to the parents of the sudents and to the State to require that the students behave themselves while they are attending a State College, and that is (sic) the reasons why we took the action that we did. That is all."

Superintendent of Education Stewart testified that he voted for expulsion because the students had broken rules and regulations pertaining to all of the State institutions, and, when required to be more specific, testified:

> "The Court: What rule had been broken is the question, that justified the expulsion insofar as he is concerned?
> "A. I think demonstrations without the consent of the president of an institution."

The testimony of other members of the Board assigned somewhat varying and differing grounds and reasons for their votes to expel the plaintiffs.

The district court found the general nature of the proceedings before the State Board of Education, the action of the Board, and the

official notice of expulsion given to the student as follows:

"Investigations into this conduct were made by Dr. Trenholm, as president of the Alabama State College, the Director of Public Safety for the State of Alabama under directions of the Governor, and by the investigative staff of the Attorney General for the State of Alabama.

"On or about March 2, 1960, the State Board of Education met and received reports from the Governor of the State of Alabama, which reports embodied the investigations that had been made and which reports identified these six plaintiffs, together with several others, as the 'ring leaders' for the group of students that had been participating in the above-recited activities. During this meeting, Dr. Trenholm, in his capacity as president of the college, reported to the assembled members of the State Board of Education that the action of these students in demonstrating on the college campus and in certain downtown areas was having a disruptive influence on the work of the other students at the college and upon the orderly operation of the college in general. Dr. Trenholm further reported to the Board that, in his opinion, he as president of the college could not control future disruptions and demonstrations. There were twenty-nine of the Negro students identified as the core of the organization that was responsible for these demonstrations. This group of twenty-nine included these six plaintiffs. After hearing these reports and recommendations and upon the recommendation of the Governor as chairman of the Board, the Board voted unanimously, expelling nine students, including these six plaintiffs, and placing twenty students on probation. This action was taken by Dr. Trenholm as president of the college, acting pursuant to the instructions of the State Board of Education. Each of these plaintiffs, together with the other students expelled, was officially notified of his expulsion on March 4th or 5th, 1960.[4] No formal charges were placed against these students and no hearing was granted any of them prior to their expulsion."

"[4][Same as footnote 2, supra, of this opinion.]"

Dixon v. Alabama State Board of Education, M.D. Ala., 1960, 186 F.Supp. 945, 948, 949.

The evidence clearly shows that the question for decision does not concern the sufficiency of the notice or the adequacy of the hearing, but is whether the students had a right to any notice or hearing whatever before being expelled.[4]

The district court wrote at some length on that question, as appears from its opinion. *Dixon v. Alabama State Board of Education, supra*, 186 F.Supp. at pp. 950-952. After careful study and consideration, we find ourselves unable to agree with the conclusion of the district court that no notice or opportunity for any kind of hearing was required before these students were expelled.

It is true, as the district court said, that ". . .

4. The plaintiff Dixon testified:
"Q. Now on that day—from February 25 until the date that you received your letter of expulsion, which you have already identified, will you tell the Court whether any person at the College gave you any official notice that your conduct was unbecoming as a student of Alabama State College?
"A. No.
"Q. Did the president or any other person at the College arrange for any type of hearing where you had an opportunity to present your side prior to the time you were expelled?
"A. No.
"Q. Your answer was no?
"A. No.
The testimony of Governor Patterson, Chairman of the State Board of Education, was in accord:
"Q. Did the State Board of Education, prior to the time it expelled the plaintiffs, give them an opportunity to appear either before the College or before the Board in order to present their sides of this pic—of this incident?
"A. No, other than receiving the report from Dr. Trenholm about it.
"Q. Did the Board direct Dr. Trenholm to give the students formal notice of why they were expelled?
"A. No, the Board—the Board passed a resolution instructing Dr. Trenholm to expel the students and put twenty on probation, and Dr. Trenholm carried that out."
State Superintendent of Education Stewart testified:
"Q. Were these students given any type of hearing, or were formal charges filed against them before they were expelled?
"A. They were—Dr. Trenholm expelled the students; they weren't given any hearing.
"Q. No hearing?
"A. I don't think they would be given a hearing in any of our schools in this State; if they couldn't behave themselves, I think they should go home.
"Q. Do you—were they warned at all prior to expulsion?
"A. Not as I know of; I can't answer that question. Dr. Trenholm was in the meeting, and that afternoon after the Board meeting, he was given the—the decision, and he was the one who took action.
"Q. When the State Board of Education expels a student, is there any possibility of appeal or any opportunity for him to present his side of the story?
"A. I never have heard of it."

there is no statute or rule that requires formal charges and/or a hearing . . . ," but the evidence is without dispute that the usual practice at Alabama State College had been to give a hearing and opportunity to offer defenses before expelling a student. Defendant Trenholm, the College President, testified:

> "Q. The essence of the question was, will you relate to the Court the usual steps that are taken when a student's conduct has developed to the point where it is neccessary for the administration to punish him for that conduct?
> "A. We normally would have conference with the student and notify him that he was being asked to withdraw, and we would indicate why he was being asked to withdraw. That would be applicable to academic reasons, academic deficiency, as well as to any conduct difficulty.
> "Q. And at this hearing ordinarily that you would set, then the student would have a right to offer whatever defense he may have to the charges that have been brought against him?
> "A. Yes."

Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satify due process depend upon the circumstances and the interests of the parties involved. As stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Committee v. McGrath*, 1951, 341 U.S. 123, 163:

> "Whether the *ex parte* procedure to which the petitioners were subjected duly observed 'the rudiments of fair play,' . . . cannot . . . be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."

Just last month, a closely divided Supreme Court held in a case where the governmental power was almost absolute and the private interest was slight that no hearing was required. *Cafeteria and Restaurant Workers Union v. McElroy, et. al., U.S. m/s,* Oct. Term 1960, No. 97, decided June 19, 1961. In that case, a short-order cook working for a privately operated cafeteria on the premises of the Naval Gun Factory in the City of Washington was excluded from the Gun Factory as a security risk. So, too, the due process clause does not require that an alien never admitted to this Country be granted a hearing before being *excluded. Knauff v. Shaughnessy*, 1950, 338 U.S. 537, 542, 543. In such case the executive power as implemented by Congress to *exclude* aliens is absolute and not subject to the review of any court, unless expressly authorized by Congress. On the other hand, once an alien has been admitted to lawful residence in the United States and remains physically present here it has been held that, "although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard." *Kwong Hai Chew v. Colding*, 1953, 344 U.S. 590, 597, 598.

It is not enough to say, as did the district court in the present case, "The right to attend a public college or university is not in and of itself a constitutional right." (186 F.Supp. at 950. That argument was emphatically answered by the Supreme Court in the *Cafeteria and Restaurant Workers Union case, supra,* when it said that the question of whether ". . . summarily denying Rachel Brawner access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment . . . cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. 'One may not have a constitutional right to go to Baghdad, but the Government may not not prohibit one from going there unless by means consonant with due process of law.'" As in that case, so here, it is necessary to consider "the nature both of the private interest which has been impaired and the governmental power which has been exercised."

The appellees urge upon us that under a provision of the Board of Education's regulations the appellants waived any right to notice and a hearing before being expelled for miscinduct.

> "Attendance at any college is on the basis of a mutual decision of the student's parents

> and of the college. Attendance at a particular college is voluntary and is different from attendance at a public school where the pupil may be required to attend a particular school which is located in the neighborhood or district in which the pupil's family may live. Just as a student may choose to withdraw from a particular college at any time for any personally-determined reason, the college may also at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult."

We do not read this provision to clearly indicate an intent on the part of the student to waive notice and a hearing before expulsion. If, however, we should so assume, it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process. See *Slochower v. Board of Education*, 1956, 350 U.S. 551, 555; *Wieman v. Updegraff*, 1952, 344 U.S. 183, 191, 192; *United Public Workers v. Mitchell*, 1947, 330 U.S. 75, 100; *Shelton v. Tucker*, U.S. m/s, Oct. Term, 1960, No. 14. Only private associations have the right to obtain a waiver of notice and hearing before depriving a member of a valuable right. And even here, the right to notice and a hearing is so fundamental to the conduct of our society that the waiver must be clear and explicit. *Medical and Surgical Society of Montgomery County v. Weatherby*, 75, Ala. 248, 256-59. In the absence of such an explicit waiver, Alabama has required that even private associations must provide notice and a hearing before expulsion. In *Medical Society of Montgomery County v. Weatherby, supra*, it was held that a physician could not be expelled from a medical society without notice and a hearing. In *Local Union No. 57, etc, v. Boyd, Ala., 1944*, 16 So.2d 705, 711 a local union was ordered to reinstate one of its members expelled after a hearing of which he had insufficient notice.

The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning in which the plaintiffs were students in good standing. It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.

There was no offer to prove that other colleges are open to the plaintiffs. If so, the plaintiffs would nonetheless be injured by the interruption of their course of studies in mid-term. It is most unlikely that a public college would accept a student expelled from another public college of the same state. Indeed, expulsion may well prejudice the student in completing his education at any other institution. Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.

Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded, as was held by the district court, that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion, or the courts would have a duty to require reinstatement. The possibility of arbitrary action is not excluded by the existence of reasonable regulations. There may be arbitrary application of the rule to the facts of a particular case. Indeed, that result is well nigh inevitable when the Board hears only one side of this issue. In the disciplining of college students there are no considerations of immediate danger to the public, or a peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education.

The district court, however, felt that it was governed by precedent, and stated that, "the courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution." With deference, we must hold that the district court has simply misinterpreted the precedents.

The language above quoted from the district court is based upon language found in 14 C.J.S., Colleges and Universities, § 26, p. 1360, which, in turn, is paraphrased from *Anthony v. Syra-*

cuse University, 231 N.Y. Supp. 435, reversing 223 N.Y. Supp. 797. (14 C.J.S., Colleges and Universities, § 26, pp. 1360, 1363 note 70.) This case, however, concerns a private university and follows the well-settled rule that the relations between a student and a private university are a matter of contract. The *Anthony* case held that the plaintiffs had specifically waived their rights to notice and hearing. See also *Barber v. Bryn Mawr*, 122 Atl. 220 (Pa., 1923). The precedents for public colleges are collected in a recent annotation cited by the district court. 58 A.L.R. 2d 903-20. We have read all of the cases cited to the point, and we agree with what the annotator himself says: "The cases involving suspension or expulsion of a student from a public college or university all involve the question whether the hearing given to the student was adequate. In every instance the sufficiency of the hearing was upheld." 58 A.L.R. 2d at p. 909. None held that no hearing whatsoever was required. Two cases not found in the annotation have held that some form of hearing is required. In *Commonwealth ex rel, Hill v. McCauley*, 3 Pa. Co. Ct. Rep. 77 (1886), the court went so far as to say that an informal presentation of the charges was insufficient and that a state-supported college must grant a student a full hearing on the charges before expulsion for misconduct. In *Gleason v. University of Minnesota*, 116 N.W. 650 (1908), on reviewing the overruling of the state's demurrer to a petition for mandamus for reinstatement, the court held that the plaintiff stated a prima facie case upon showing that he had been expelled without a hearing for alleged insufficiency in work and acts of insubordination against the faculty.

The appellees rely also upon *Lucy v. Adams*, D.C.N.D. Ala., C.A. No. 652, January 1957, where Autherine Lucy was expelled from the University of Alabama without notice of hearing. That case, however, is not in point. Autherine Lucy did not raise the issue of an absence of notice or hearing.

It was not a case denying any hearing whatsoever but one passing upon the adequacy of the hearing,[5] which provoked from Professor Warren A. Seavey of Harvard the eloquent comment:

> "At this time when many are worried about dismissal from public service, when only because of the overriding need to protect the public safety is the identity of informers kept secret, when we proudly contrast the full hearings before our courts with those in the benighted countries which have no due process protection, when many of our courts are so careful in the protection of those charged with crimes that they will not permit the use of evidence illegally obtained, our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a state educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket."

Dismissal of Students: "Due Process," Warren A. Seavey, 70 Harvard Law Review 1406, 1407. We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.

For the guidance of the parties in the event of further proceedings, we state our views on the nature of the notice and hearing required by due process prior to expulsion from a state college or university. They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct, as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and dis-

5. People ex rel. Bluett v. Board of Trustees of University of Illinois, 10 Ill. App. 2d 207, 134 N.E. 2d 635.

turbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college. In the instant case, the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student's inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Dissent

CAMERON, Circuit Judge, Dissenting:

The opinion of the district court in this case[1] is so lucid, literate and moderate that I cannot forego expressing surprise that my brethren of the majority can find fault with it. In this dissent I shall try to avoid repeating what the lower court has so well said and to confine myself to an effort to refute the holdings of the majority where they do attack and reject the lower court's opinion.

A good place to start is the quotation made by the majority from the recent case of *Cafeteria and Restaurant Workers Union v. McElroy*, 1961, 29 L. W. 4743, 4745 et seq.,____ U.S. ____, wherein the discussion is made of one's right to "go to Baghdad." I would add to the language quoted by the majority from that case the sentences which follow it:

> "It is the petitioner's claim that due process in this case required that Rachel Brawner be advised of the specific grounds for her exclusion and be accorded a hearing at which she might refute them. We are satisfied, however, that under the circumstances of this case such a procedure was not constitutionally required.
>
> "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interests. '...The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation . . . . "Due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of decisions . . .' Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-163 (concurring opinion).
>
> "As these and other cases make clear, consideration of what procedure due process may require under any given set of circumstances must begin with a determination of the *precise nature of the government function involved as well as of the private interest that has been affected by governmental action.* Where it has been possible to characterize that private interest (perhaps in over-simplification) as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. . . ."[2] [Emphasis added.]

The failure of the majority to follow the reasoning of *McElroy, supra*, results, in my opinion,

1. 86 F. Supp. 945, 1960.

2. The dissenting opinion in that case contains language which further illuminates the problem before us:

> ". . . But the Court goes beyond that. It holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ 'security requirements' as a blind behind which to dismiss at will for the most discriminatory of causes.
>
> "Such a result in effect nullifies the substantive right—not to be arbitrarily injured by government—which the Court purports to recognize. . . . For under today's holding petitioner is entitled to no process at all. She is not told what she did wrong; she is not given a chance to defend herself. She may be the victim of the basest calumny perhaps even the caprice of the government officials in whose power her status rested completely. In such a case, I cannoit believe that she is not entitled to some procedures.
>
> " '[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction. is a principle basic to our society." [Citing McGrath, supra.]

from a basic failure to understand the nature and mission of schools. The problem presented is *sui generis.*

Everyone who has dealt with schools knows that it is necessary to make many rules governing the conduct of those who attend them, which do not reach the concept of criminality but which are designed to regulate the relationship between school management and the student based upon practical and ethical considerations which the courts know very little about and with which they are not equipped to deal. To extend the injunctive power of federal courts to the problems of day to day dealings between school authority and student discipline and morale is to add to the now crushing responsibilities of federal functionaries, the necessity of qualifying as a Gargantuan aggregation of wet nurses or baby sitters. I do not believe that a balanced consideration of the problem with which we are dealing contemplates any such extreme attitude. Indeed, I think that the majority has had to adopt the minority view of the courts in order to reach the determination it has here announced.

Nor do I find of favorable (to the majority) significance the introductory sentence quoted by it from the annotation in 58 ALR at page 909.[3] The quoted statement implies, rather, that there is no case where a student at a public college or university has taken the position that he was entitled to a hearing before being expelled. More in point, it seems to me, is the addition to the text found on page 4 of the July 1961 pocket part of American Jurisprudence, Vol. 55, § 22, page 16, of the article on Universities and Colleges. I quote the closing sentences of 55 Am. Jur., § 22, pp. 15-16 of that article, adding the paragraph appearing in the pocket part:

> ". . . Where the conduct of a student is such that his continued presence in the school will be disastrous to its proper discipline and to the morals of the other pupils, his expulsion is justifiable. Only where it is clear that such an action with respect to a student has not been an honest exercise of discretion, or has arisen from some motive extraneous to the purposes committed to that discretion, may the courts be called upon for relief.
>
> "There is a conflict of authority as to whether notice of the charges and hearing are required before suspensions or expulsion of a student. Assuming that a student is entitled to a hearing prior to his expulsion from an institution of learning, the authorities are not in agreement as to what kind of hearing must be given to him. A few cases hold that he is entitled to a formal hearing clothed with all the attributes of a judicial hearing. However, the weight of authority is to the effect that no formal hearing is required."

The general rule covering the subtitle "Government and Discipline" in the general treatise on Colleges and Universities is thus stated in the black-typed summary of the law in Vol. 14 Corpus Juris Secundum, § 26, page 1360:

> "Broadly speaking, the right of a student to attend a public or private college or university is subject to the condition that he comply with its scholastic and disciplinary requirements, and the proper college authorities may in the exercise of a broad discretion formulate and enforce reasonable rules and regulations in both respects. The courts will not interfere in the absence of an abuse of such discretion."

All of these expressions of the general rule seem to me to justify and require our adherence to that rule under the facts of this case. The majority opinion sets out many of them, but I think its statement should be supplemented and set forth in chronological order.

Appellants and other members of the student body of Alabama State College had, for a period prior to the happenings outlined, been attending meetings at Negro churches and other places where outsiders, including professional agitators, had been counseling that the students of that institution engage in "demonstrations." Appellants, along with a total of between twenty-nine and thirty-five students of the college, proceeded en masse into a snack bar in the basement of the county court house at Montgomery, Alabama, seating themselves in the privately owned facility so as to occupy nine tables. The lady in charge of the eating place asked them to depart and they refused. Officers were called and, upon their arrival, they first asked that all white patrons leave the premises, which was promptly

3. "The cases involving suspension or expulsion of a student from a public college or university all involve the question whether the hearing given to the student was adequate. *In every instance the sufficiency of the hearing was upheld.*" [Emphasis Added.]

done. The Negroes refused their request to leave until the lights were put out, whereupon they proceeded to the hall of the court house. Inasmuch as they were blocking ingress and egress therefrom, they were ordered by the officers to take their stands against the walls, which they did. They remained in the court house about one and one-half hours following their entrance about 11:00 A.M. They refused to give their names to reporters who interviewed them. The occurrence took place on February 25, 1960.

The president of the college, H. Councill Trenholm, investigated the occurrence at the direction of the governor of Alabama and made his report and recommendation to the State Board of Education. About five o'clock on the afternoon of the occurrence he had released a mimeographed statement making an appeal to the students and staff that they "refrain from any activities which may have a damaging effect upon the reputation and relationships of college and . . . have concern that there not be any type of further involvement of any identified student of Alabama State College." He reported that, from his investigation conducted on the campus, it was his opinion that twenty-nine students who were the leaders in the activities he had investigated were subject to expulsion.[4]

On February 26, 1960, several hundred students, including appellants, staged another demonstration at the Montgomery Court House by attending a trial where a fellow student was charged with perjury to which he pled guilty. The several hundred demonstrators marched around the court house and then walked, two by two, back to the college about two miles away. A snapshot received in evidence depicted a mob-like gathering, on the college campus on the same day, of a large number of students ganged about the college president of thirty-five years tenure. The expressions on the faces of the participants, including at least some of appellants, portrayed a group in the grip of anger, exhibiting a threatening and menacing attitude. The scene spoke more eloquently to the trial court of the spirit and attitude of the appellants and the followers they had gathered than many reams of oral testimony could have.

February 27, several hundred Negro college students, including appellants, staged mass demonstrations in Montgomery and Tuskegee, some of which were attended by violence. On the same day a large group of students from the college, including appellants, gathered at a Negro church and one of appellants, Bernard Lee, filed a petition with the governor in which it was stated, among other things: "We strongly feel that our conduct was not of such that we should owe our college or state an apology. If our conduct has disturbed you or President Trenholm, we regret this. But we have no sense of shame or regret for our conduct . . ."

On the same day the governor was advised by the college president that he had called upon members of the student body to behave themselves and return to classes and had urged the students not to engage in conduct which might cause racial disturbances. A like plea was made by the Attorney General of Alabama both to white and colored people. March 1, 1960, at about 8:00 A.M. approximately six hundred students of the college marched to the steps of the state capitol, where student leaders, including appellants, made addresses calling on all the students to boycott and strike against the college if any students were expelled. The gathering was policed by a number of the state officials to prevent untoward incidents.

March 2, 1960, the State Board of Education met and heard Dr. Trenholm's report, ordering the nine students mentioned above to be expelled and twenty to be placed on probation. The Board had the benefit of reports made by agents of the Department of Public Safety, which revealed the names of the demonstrators and of their leaders, as well as that of college president and of the governor who had witnessed portions of the demonstrations.

March 3, 1960, the date of the expulsion order, about two thousand Negro students staged a demonstration at a church near the college campus at which appellants were the leaders. They urged the students to refrain from returning to classes and from registration for the new term, and publicly denounced the State Board and the college administration. The students stayed away from classes and milled about the campus in general disorder.

These events all transpired before the expulsion of appellants. But the "demonstrations"

4. The governor recommended, however, that only Bernard Lee, Norfolk, Va.; St. John Dixon, National City, Cal.; Edward E. Jones, Pittsburg, Pa.; Leon Rice, Chicago, Ill.; Howard Shipman, New York, N. Y.; Elroy Emory, Ragland, Ala.; James McFadden, Prichard, Ala.; Joseph Peterson, Newcastle, Ala.; Marzette Watts, Montgomery, Ala., be expelled at the end of the current term and that the remainder be placed on probation and allowed to remain in school pending good behavior.

did not cease. March 4, a wildly cheering crowd of Negro students gathered at a church and were addressed by one or more agitators of national prominence, and an appeal was made for a meeting the following Sunday on the steps of the state capitol. At the meeting, one or more of appellants and a number of other students were very critical of the governor and the college administration.

March 5, 1960, appellant Bernard Lee, representing the demonstrators, sent a telegram to the president of the student body at Tuskegee urging them to join in the demonstrations.

March 6, 1960, several thousand Negroes, including appellants and hundreds of the students of the college assembled near the steps of the capitol and approximately ten thousand white people gathered in the same vicinity. A large gathering of city and county officers and the use of fire hose finally avoided an open clash between the two groups. For a number of days following, there were demonstrations on the campus of the college accompanied by some violence and some arrests were made by the police.

March 11, the entire group which had initiated the demonstrations were convicted and fined. Several months later, appellants and several other students were still engaged in constant efforts to stir up trouble and dissension among the students and faculty of the college.

After appellants were expelled a document signed by one of them, on behalf of the executive committee of the student body, issued a public call to the student body of every school in Alabama, in the South and in the nation to support the appellants, and the same document called upon parents, teachers and the people of the nation to give them support.

Each of the appellants had, in his application for admission to the college, agreed in writing to abide by college policies and regulations relating to admission, attendance, conduct, withdrawal or dismissal.

A part of the foregoing recital is taken from the affidavit of Governor Patterson of Alabama. It was attached to and offered as a portion of the answer of appellees to the complaint and the motion for preliminary injunction. This motion was considered along with all of the other motions filed and with the hearing of witnesses and was included in the order from which this appeal was taken. The affidavit was competent evidence even in a court. Rule 43 (e) F.R.C.P.

The opinion of the majority stresses that definite proof was not made of the attendance of all of the appellants at all of the "demonstrations" (the word is taken from the testimony of the only appellant who testified in the court below). I think that ample showing was made to establish that the appellants were at all of the demonstrations and were the ringleaders of them. They participated in the enterprise as joint venturers from the start and every document emanating from them showed the adhesiveness of the group.

It is interesting to find what the majority considers to be the significance of an assumed absence of proof in the light of the fact that only one of the appellants took the witness stand in the court below, although they all announced at the outset that they were ready for trial and manifestly were present in court. Their presence and participation in all which transpired was shown by believable evidence and circumstances and stand wholly undenied. In a recent case charging a fraudulent civil conspiracy against a defendant [5] where the proof was very slim, this Court speaking through Judge Rives, stated the rule as follows:

> "Certainly, the proof was sufficient to make out a prima facie case of appellant's involvement in each of the transactions and liability to respond civilly in liquidated damages under the statute; . . . his failure either to take the stand, or show that he was unable to testify, or even to offer any excuse whatever for his failure to testify in explanation of suspicious facts and circumstances peculiarly within his knowledge, fairly warrants the inference that his testimony, if produced, would have been adverse."

See to the same effect these additional cases from this Circuit: *United States v. Levenson*, 1959, 262, F.2d 659; *United States v. Marlowe*, 1956, 235 F.2d 366; *Williams v. United States*, 1952, 199 F.2d 921; *Paudler v. Paudler*, 1950, 185 F.2d 901, certiorari denied, 341 U.S. 920; and *United States v. Priola*, 1959, 272 F.2d 589.

A fortiori, in an equity case where parties are seeking the extreme remedy of injunction against state officers, it does not lie in the mouths of appellants to decry the weakness of the opposition proof when they, having all the facts in their

5. Daniel v. United States, 1956, 234 F.2d 102, 106, certiorari denied, 352 U.S. 971.

possession, sit silently by when challenged by assertions which it behooved them to refute if they would support their case. They were accused and convicted by competent proof, including a picture and writings authored by them, of public boorishness, of defying the authority of the officials of their school and state, of blatant insubordination, of endeavoring to disrupt the school they had agreed to support with loyalty, as well as to break up other schools, and had openly incited to riot; and when their time came to speak, they stood mute, offering only one of their group along with the college president and two newspaper reporters as witnesses.

Before they were notified of their expulsion they had issued public statements admitting everything which was the basis of their expulsion, and had disclosed everything they could have brought forward in any hearing which might have been given them before they were notified that their conduct required their separation from connection with the college. It is difficult to perceive the validity of the argument that they were not given a hearing when, called upon to refute proof offered against them and themselves carrying the burden of proof throughout, they failed to say a word in their defense.

We are trying here the actions of State officials, which actions we are bound to invest with every presumption of fairness and correctness. Certainly the Board had before it a responsible and credible showing which justified their finding that these appellants were guilty of wilful disobedience of the rules and directives of the head of the college they were attending and of conduct prejudicial to the school and unbecoming a student or future teacher in the schools of Alabama, as well as of insubordination and insurrection and inciting other peoples to like conduct. It is undisputed that the Board made a leisurely and careful investigation and passed its judgment in entire good faith. The State of Alabama had no statute and the school had no rule or regulation requiring any other hearing than that which was had, and the Board was entirely justified in declining "to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult." It is worth noting, too, that President Trenholm, testifying as a witness for appellants, stated that the rules of the school had been in effect more than thirty years; and that there was no requirement in them for notice or hearing and that prior practices did not include such as a precedent.

It is undisputed that failure to act as the Board did act would have resulted in a complete disruption of discipline and probable breaking up of a school whose history ran back many years, and whose president had held the position for thirty-five years. If he and the School Board had done less, they would, in my opinion, have been recreant to their duties. The moderate action they took did bring order out of chaos and enable the school to continue operation.

I do not feel that we are called upon here to volunteer our ideas of procedure in separating students from state colleges and universities. I think each college should make its own rules and should apply them to the facts of the case before it, and that the function of a court would be to test their validity if challenged in a proper court proceeding.

A sane approach to a problem whose facts are closely related to the one before us was made by the United States Court of Appeals for the Second Circuit in *Steier v. N. Y. State Education Commission et al.*, 1959, 271 F.2d 13. Its attitude is thus epitomized on page 18:

> "Education is a field of life reserved to the individual states. The only restriction the Federal Government imposes is that in their educational program no state may discriminate against an individual because of race, color or creed.
>
> "As so well stated by Judge Wyzanski in Cranney v. Trustees of Boston University, D.C., 139 F. Supp. 130, to expand the Civil Rights Statute so as to embrace every constitutional claim such as here made would in fact bring within the initial jurisdiction of the United States District Courts that vast array of controversies which have heretofore been raised in state tribunals by challenges founded upon the 14th Amendment to the United States Constitution. It would be arrogating to the United States District Courts that which is purely a State Court function. Conceivably every State College student, upon dismissal from such college, could rush to a Federal Judge seeking review of the dismissal.
>
> "It is contrary to the Federal nature of our system — contrary to the concept of the relative places of States and Federal Courts.
>
> "Whether or not we would have acted

as did the Administrator of Brooklyn College in dismissing the plaintiff matters not. For a Federal District Court to take jurisdiction of a case such as this would lead to confusion and chaos in the entire field of jurisprudence in the states and in the United States."

Certainly I think that the filing of charges, the disclosure of names of proposed witnesses, and such procedures as the majority discusses are wholly unrealistic and impractical and would result in a major blow to our institutions of learning. Every attempt at discipline would probably lead to a *cause célèbre*, in connection with which federal functionaries would be rushed in to investigate whether a federal law had been violated. I think we would do well to bear in mind the words of Mr. Justice Jackson:[6]

". . . no local agency which is subject to federal investigation, inspection, and discipline is a free agency. I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot become totalitarian without a centralized national police."

I think, moreover, that, in these troublous times, those in positions of responsibility in the federal government should bear in mind that the maintenance of the safety, health and morals of the people is committed under our system of government to the states. More than a hundred years ago Chief Justice Marshall[7] stated the principle in these words:

"The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states."

I dissent.

6. "The Supreme Court in the American System of Government," p. 70.

7. Brown v. Maryland, 1827, 12 Wheat., 419.

CIVIL RIGHTS
Access to Courts—Federal Courts

Mark O. HATFIELD, et al. v. Paul R. BAILLEAUX, et al.

United States Court of Appeals, Ninth Circuit, April 11, 1961, 290 F.2d 632.

SUMMARY: Prisoners in the Oregon state penitentiary brought a class action in federal district court under the federal Civil Rights Act alleging that defendants, state prison officials, acting under color of state law had conspired to deny them their constitutional rights to access to the courts by imposing restrictions on preparation of legal documents. The district court held that prisoners have a right to adequate access to legal materials, and to prepare legal documents in their cells as well as in the prison library, and enjoined interference with these rights. 4 Race Rel. L. Rep. 925 (1959). The Ninth Circuit Court of Appeals reversed and remanded the case with directions to dismiss the complaint. The court first defined "access to the courts" as the opportunity to prepare and file pleadings in litigation affecting one's personal liberty and to communicate with courts and lawyers concerning such matters. Relying on the absence of any finding that plaintiffs had been denied access "to all courts," or had lost the right to litigate in any proceeding involving personal liberty, or had been substantially delayed in obtaining judicial action, the court ruled that the prison regulations do not, in fact, interfere with such reasonable access. It also found no purpose to hamper plaintiffs' access to the courts, because defendants' primary purpose was to preserve discipline by preventing some prisoners from becoming inmate leaders through the informal practice of law. Since the regulations had neither the purpose nor the effect of denying access, the court found it proper to apply the principle that, "apart from due process considerations, the federal courts have no power to control or supervise state prison regulations."

CIVIL RIGHTS
Limitations—Federal Statutes

Paul EGAN v. CITY OF AURORA, et al.

United States Court of Appeals, Seventh Circuit, June 30, 1961, 291 F.2d 706.

SUMMARY: The mayor of Aurora, Illinois, brought an action in a federal district court under the Civil Rights Act against that city, and named city commissioners and police officers for $5,000,000 damages claimed to have been caused by an alleged conspiracy to deprive plaintiff of his rights of freedom of speech and assembly under the Fourteenth Amendment. Plaintiff alleged that due to this conspiracy, he had been arrested under color of a state breach of the peace statute, without warrant or probable cause, while conducting a public meeting. Defendants moved to dismiss, alleging that the plaintiff had invited the public to attend the meeting bearing arms and that the offense of disturbing the peace had been committed in the presence of police officers during the meeting. The court, without a trial, directed a judgment for defendants. 4 Race Rel. L. Rep. 919 (1959). The court of appeals affirmed on the ground that it was evident that the invitation to attend the meeting bearing arms was fraught with danger, and therefore defendants were entitled to judgment as a matter of law. 5 Race Rel. L. Rep. 415 (1960). The United States Supreme Court reversed as to the individual defendants, stating that the court of appeals had not been explicit concerning the grounds for dismissal under section 1985 of the Civil Rights Act, and that its construction of section 1983 was apparently inconsistent with the view taken by the Supreme Court in *Monroe v. Pape* [6 Race Rel. L. Rep. 16 (1961)]. 6 Race Rel. L. Rep. 15 (1961).

On remand, the Seventh Circuit Court of Appeals affirmed the dismissal as to the city commissioners, holding that since plaintiff had not alleged that their conspiracy had been for the purpose of depriving plaintiff of equal protection of the laws, it did not state a claim under section 1985(3). The dismissal was reversed, however, as to the police officers. While agreeing with the district court that plaintiff's actions had created a clear and present danger, the court held that plaintiff's allegation that he had been deprived of his Fourteenth Amendment rights by the arrest must be tried upon its merits.

Before HASTINGS, Chief Judge, and DUFFY and CASTLE, Circuit Judges.

DUFFY, Circuit Judge.

Plaintiff was the Mayor of Aurora, Illinois, when he brought this action in the United States District Court for the Northern District of Illinois. He named, as defendants, the City of Aurora and certain of its officers,[1] and asked damages in the sum of five million dollars, charging violations of the Federal Civil Rights statutes, Title 42 U.S.C.A. §§ 1983 and 1985.

In the District Court, defendants moved to dismiss the action because the complaint as to each of them failed to state a claim upon which relief could be granted. The District Court granted the motion and entered judgment for the defendants. Judge Campbell's excellent opinion appears in 174 F.Supp. 794.

On appeal, this Court affirmed, 275 F.2d 377. However, the United States Supreme Court, in a brief per curiam opinion, 365 U.S. 514, 81 S.Ct. 684, 5 L.Ed.2d 741, reversed as to all defendants except the City of Aurora, and pointed out the opinions of the District Court and of our Court were handed down prior to their opinion in Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492.

The Supreme Court stated that the opinion of this Court was not explicit as respects the grounds for dismissing the complaint under 42 U.S.C.A. § 1985. The Court also suggests that this Court seems to have decided the case on a construction of 42 U.S.C.A. § 1983 which is, apparently, inconsistent with Monroe v. Pape. The cause as to the individual defendants was remitted to us "for a reconsideration in light of this opinion."

We first consider 42 U.S.C.A. § 1985, the so-called conspiracy statute. It is important to note that Monroe v. Pape, supra, did not deal with

1. The defendants named were City of Aurora, the chief of Police of Aurora and six police officers, four individuals who were City Commissioners of Aurora, and the Corporation Counsel of Aurora.

or discuss this section of the Civil Rights Act. It should also be noted the requirement of "under color of any statute * * * [or] regulation * * * of any State * * *" which appears in Section 1983 does not appear in Section 1985.

The complaint herein states the cause of action is based on Sections 1983 and 1985(3). It does allege in general terms a conspiracy to deprive plaintiff of his right to freedom of speech and assembly. But, Section 1985(3) does not create a cause of action or claim upon which relief can be granted, based on that sort of a conspiracy. The section specifically provides that a conspiracy to be actionable must be "for the *purpose* of depriving * * * any person * * * of the equal protection of the laws, or of equal privileges and immunities under the laws * * *." (Emphasis supplied.)

In Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.Ed. 1253, the action was brought under the predecessor of Section 1985(3). The Court said, at page 661 of 341 U.S. at page 941 of 71 S.Ct.: "* * * it is clear that this statute does not attempt to reach a conspiracy to deprive one of rights, unless it is a deprivation of equality, of 'equal protection of the law,' or of 'equal privileges and immunities under the law.'"

In further explanation of the restricted form of the conspiracy which might be the basis of a suit for damages under Section 1985(3), the Supreme Court, in the same opinion stated, at page 661 of 341 U.S., at page 942 of 71 S.Ct.: "The only inequality suggested is that the defendants broke up plaintiffs' meeting and did not break up meetings of others with whose sentiment they agreed. To be sure, this is not equal injury, but it is no more a deprivation of 'equal protection' or of 'equal privileges and immunities' than it would be for one to assault one neighbor without assaulting them all, or to libel some persons without mention of others."

In Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, the Court held that to sustain an action under Section 1985, it must be alleged and proved the purpose of the act complained of was to purposely discriminate between persons or classes of persons.

We, therefore, explicitly hold that the plaintiff's complaint did not state a claim upon which relief could be granted under 42 U.S.C.A. § 1985(3). It follows, the District Court was correct in dismissing the complaint insofar as relief was sought under that section.

Plaintiff argues that the allegation of his complaint alleging a conspiracy to deprive him of his right to free speech and assembly, states a claim upon which relief can be granted under Section 1983.[2]

In paragraph 8 of the complaint, plaintiff alleges the actions taken by Curran (Chief of Police) and other police officer defendants named "were taken as a result of a conspiracy between them * * *" and the four named City Commissioners and Charles Darling, the Corporation Counsel. It is apparent that no cause of action is stated against the four City Commissioners and the Corporation Counsel unless the statute (Section 1983) creates a cause of action based upon a conspiracy.

This Court stated in Jennings v. Nester, 217 F.2d 153, 154, "Section 1983 does not mention conspiracy, while Section 1985 does. Therefore, the Act creates a cause of action for a conspiracy to deny equal protection, but not for a conspiracy to deny due process."

We shall adhere to and follow our decision in Jennings v. Nester. We do not intend to read into Section 1983 something that is not there. Possibly Congress could create a civil cause of action based upon a conspiracy to deprive a person of his right to free speech and assembly, but, as yet, it has not done so. It follows that the District Court was correct in dismissing the complaint insofar as it was based upon a conspiracy to violate Section 1983.

Although plaintiff endeavored to base his claim upon a conspiracy to violate Sections 1983 and 1985(3), there is, in the complaint, some broad language as to the police officers which can be interpreted to state a claim under Section 1983 irrespective of the charge of conspiracy. The complaint alleged Police Chief Curran, and police officers Stover, Straud and Rukas, laid hands upon the plaintiff, arrested him, and carried him physically from the rostrum on which he was speaking, and incarcerated him in the city jail in Aurora; that the defendants named were aided and abetted by officers Pfiefer, Schuhow and Day.

In a later paragraph in the complaint, plain-

2. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

tiff alleges: "By reason of the facts herein alleged, plaintiff * * * was deprived of the right of free speech and free assembly guaranteed to him by the Fourteenth Amendment. * * *"

We agree with the District Court, Egan's actions, including his proclamation and invitation to all races and creeds including "legally registered Communists" to assemble and bear arms, created a clear and present danger to the citizens of Aurora. However, under recent decisions of the Supreme Court, we feel that there is nothing we can do but reverse the judgment of the District Court and remand for a trial upon the merits against only the police officers named as defendants.

Reversed and remanded.

CIVIL RIGHTS
Religious Freedom—Federal Courts

Theodore X. A. SEWELL et al. v. Paul F. PEGELOW, etc., et al.

United States Court of Appeals, Fourth Circuit, May 31, 1961, 291 F.2d 196.

SUMMARY: Two Negro inmates of a federal prison, professing to be of the "Muslim religion," brought action in a federal district court under the civil rights acts to enjoin prison officials from infringement of specified constitutional and civil rights. The district court dismissed the complaints without requiring defendants to answer, holding that the internal disciplinary affairs of a prison are beyond the court's jurisdiction. On appeal, the Fourth Circuit Court of Appeals reversed and remanded for further proceedings. While agreeing with the rule of law upon which the dismissal was based, the appellate court held that, since the complaint recited deprivations "inflicted for no infraction of any rule," a hearing should be required to determine whether only disciplinary measures were involved.

Before SOBELOFF, Chief Judge, HAYNSWORTH, Circuit Judge, and HARRY E. WATKINS, District Judge.

SOBELOFF, Chief Judge.

Sewell and Watson are inmates of the United States Reformatory at Lorton, Virginia, an institution maintained for prisoners sentenced by the courts of the District of Columbia. They filed complaints in the District Court for the Eastern District of Virginia, which has jurisdiction over the place of their detention, alleging that solely because of their religious beliefs, and for no other reason, they were isolated and deprived of certain constitutional and statutory rights and discriminatively treated by the superintendent and his assistants. The relief which they prayed was an order restraining and enjoining the officials from continuing the harassment and infringement of their constitutional and civil rights specified in the complaints.

Without requiring the officials to show cause or answer, and without holding a hearing, the District Court dismissed the complaints, stating that it was without jurisdiction to entertain the petition because the matters alleged relate to the discipline and conduct of the internal affairs of the Reformatory, which are exclusively within the authority of the Executive Department.

The two complaints, which closely parallel each other in their essential allegations, may be briefly summarized. They recite that the appellants are Negroes professing Islam and are known as Muslims, but on the appeal they stress that religion, rather than race, was the basis of the claimed discriminations and deprivations. They charge that all the Muslims in the institution, of whom there were thirty-eight at the time, were put in isolation and deprived of institutional privileges, including medical attention. The complainants allege that they violated no disciplinary rules or regulations, and that for no reason other than their religion they were kept for 90 days in isolation in the Disciplinary Control Building, where they were provided only "one teaspoon of food for eating

[and] a slice of bread at each meal three times per day." It is further alleged that although the floor of the cell was concrete the complainants were permitted to have a blanket and mattress only between the hours of 10:00 p. m. and 5:30 a. m. This mistreatment, the complaints repeat, was due solely to the hostility entertained by the prison officials toward persons of the Muslim faith. They cite, for example, that they are forbidden to wear medals symbolic of their faith while "that privilege is accorded to Catholics, Baptists, etc."; that unlike prisoners of other faiths, they are denied all opportunity to communicate with their religious advisers, recite their prayers or receive desired publications without fear of being persecuted. Moreover, according to the complainants, their efforts to obtain redress from the Board of Commissioners of the District of Columbia, which has general supervision over the superintendent of the prison, were frustrated by the persistent refusal of the superintendent and other prison officers to transmit any complaints.

It is a rule grounded in necessity and common sense, as well as authority, that the maintenance of discipline in a prison is an executive function with which the judicial branch ordinarily will not interfere. According to the complaints filed we have here, however, no attack upon disciplinary measures taken by the authorities, and no bare conclusory allegation of a denial of constitutional rights. There is an extensive detailed specification of deprivations and hardships inflicted for no infraction of any rule, and solely because of what the appellants describe as their religion. Moreover, it is asserted, and for the purpose of this appeal we must accept as true these and all other assertions of fact in the complaints, that the prison officials have suppressed their letters to the Commissioners of the District of Columbia setting forth their grievances in an effort to obtain relief administratively. In these circumstances the case is manifestly unlike those in which courts have declined to interfere because particular disciplinary measures were taken within the normal management of the institution.[1]

The injunction was sought under the Civil Rights Act of 1871, Rev. Stat. § 1979, 42 U.S.C.A. § 1983. There can be no doubt that a district court has power to grant injunctive relief where there has been a deprivation of civil rights, 28 U.S.C. §§ 1343 and 1651. Moreover, there is no question that the District of Columbia is included in the phrase "any State or Territory" within the meaning of the Act. Talbott v. Board of Com'rs of Silver Bow County, 1891, 139 U.S. 438, 444, 11 S.Ct. 594, 35 L.Ed. 210; Hurd v. Hodge, 1948, 334 U.S. 24, 31, 68 S.Ct. 847, 92 L.Ed. 1187.

It is beyond dispute that certain rights and privileges of citizenship are withdrawn from prisoners, but it has never been held that upon entering a prison one is entirely bereft of all of his civil rights and forfeits every protection of the law. On the contrary, it has been held that:

> "The fact that plaintiffs are incarcerated in a penitentiary under convictions for felonies, does not deprive them of the right to invoke the provisions of the Civil Rights Act, since that Act applies to any person within the jurisdiction of the United States." Siegel v. Ragen, D.C.N.D.Ill.1949, 88 F. Supp. 996, 998, affirmed 7 Cir., 1950, 180 F.2d 785, certiorari denied 339 U.S. 990, 70 S.Ct. 1015, 94 L.Ed. 139, rehearing denied 1950, 340 U.S. 847, 71 S.Ct. 12, 95 L.Ed. 621.

A recent example of judicial intervention on behalf of prisoners who had been unconstitutionally and unlawfully denied rights, is found in Spires v. Dowd, 7 Cir., 1959, 271 F.2d 659, 661, where it was held that the right to mail legal documents to clerks of courts may not be frustrated. See also: Ex parte Hull, 1941, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034; Dowd v. United States, ex rel. Cook, 1951, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215.

We find it unnecessary to adjudicate here the extent of prisoners' rights, nor do we intimate that each of the separate acts complained of by the plaintiffs would, if proved, constitute a ground for judicial relief. It is sufficient for present purposes to hold, as we do, that the complaints as a whole stated enough to require a hearing. It has been argued to us that if a hearing is ordered in this instance it will encourage a flood of such petitions, but our answer must be the same as that given by the Second Circuit: "We must not play fast and loose with basic constitutional rights in the interest of ad-

1. See e. g.: Numer v. Miller, 9 Cir., 1948, 165 F.2d 986; Powell v. Hunter, 10 Cir., 1949, 172 F.2d 330; Stroud v. Swope, 9 Cir., 1951, 187 F.2d 850; Adams v. Ellis, 5 Cir., 1952, 197 F.2d 483; Dayton v. McGranery, 1953, 92 U.S. App.D.C. 24, 201 F.2d 711; Tabor v. Hardwick, 5 Cir., 1955, 224 F.2d 526.

ministrative efficiency." United States ex rel. Marcial v. Fay, 2 Cir., 1957, 247 F.2d 662, 669, certiorari denied 355 U.S. 915, 78 S.Ct. 342, 2 L.Ed.2d 274.

The court expresses its appreciation to Mr. George Blow for his unselfish, able and conscientious performance of his important professional task as court-appointed counsel.

For reasons above stated the order appealed from must be reversed and the case remanded for further proceedings.

Reversed and remanded.

CIVIL RIGHTS
Scope—Federal Statutes

Donald Ernest KOCH v. Rudolph ZUIEBACK et al.

United States District Court, Southern District, California, Central Division, May 24, 1961, 194 F.Supp. 651.

SUMMARY: An individual brought an action in a federal district court, under Section 1985 (3) of the civil rights acts, to recover damages from the members of his selective service board for alleged harassment during his processing by the Selective Service System. Plaintiff alleged that his right to a fair hearing and due process of law before the board had been infringed, and that his personal liberty and right to conduct business had been jeopardized. The complaint was dismissed on the ground, among others, that recovery under Section 1985(3) is limited to cases involving action under color of state law, and the present case involved only action under color of federal law. The court also declared that the rights protected by the civil rights acts are only those "inherent in federal citizenship," but declined to categorize the rights asserted by plaintiff as within or without that scope.

CIVIL RIGHTS
Survival of Action—Federal Statutes

Hattie BRAZIER v. W. B. CHERRY, et al.

United States Court of Appeals, Fifth Circuit, July 7, 1961, No. 18620, 293 F.2d 401.

SUMMARY: A woman, individually and as administratrix of her deceased husband's estate, brought an action in federal district court under the federal civil rights statutes against various city and county police officers, to recover damages for injuries and the subsequent death of her husband from alleged acts said to have deprived deceased of "his rights and privileges to be secured in his person and further to deprive him of due process and equal protection of the law." The district court granted defendants' motion to dismiss, interpreting the statutes invoked as not providing for the survival of a cause of action for deprivation of civil rights after the death to the party injured, and ruling that, in the absence of a federal

statute so providing, the cause of action was extinguished by death. 6 Race Rel. L. Rep. 135 (1960).

On appeal, the Fifth Circuit Court of Appeals noted that Section 1988 of the civil rights acts adopts, as federal law, the law of the state in which the case is being tried, insofar as the federal law is "deficient in the provisions necessary to furnish suitable remedies" to effectuate the policies of the acts. It was then held that the civil rights statutes were intended "to protect the security of life and limb as well as property" against actions violating civil rights, that they are deficient to provide a suitable remedy unless the cause of action survives the death of the party whose rights are violated, and that therefore state law on the general right of survival of actions should apply. Finding that Georgia law provides for survival of the claim of a decedent for damages sustained during his lifetime, the court reversed the judgment below and remanded the case for trial. DeVane, J., dissented.

Before JONES and BROWN, Circuit Judges, and DeVANE, District Judge.

BROWN, Circuit Judge.

This case raises squarely the question whether death resulting from violation of the Civil Rights Statutes gives rise to a federally enforceable claim for damages sustained by the victim during his lifetime, by his survivors, or both. The District Court by sustaining a motion to dismiss for failure to state a claim, F.R.Civ.P. 12(b), and for want of jurisdiction over the claim, answered this broadly in the negative. *Brazier v. Cherry,* M.D.Ga., 1960, 188 F.Supp. 817.

The complaint may be severely compressed since for these motions it was taken as true. The suit was by the surviving widow individually and as administratrix of the decedent's estate. Sued as defendants were the Sheriff of Terrell County, Georgia, the Chief of Police of Dawson (Terrell County), Georgia and three police officers plus an insurance company as surety on the Sheriff's official bond. It charged that about April 18, 1958, two of the police officers acting under color of state laws illegally arrested the decedent and while in their custody wilfully and brutally attacked him without cause. These actions were intended to, and did, deprive the decedent of the rights and privileges of being secure in his person, of due process and equal protection of the law. Thereafter on April 20, 1958, all five of the named defendant officers conspired to deprive decedent of rights secured by the Constitution and laws of the United States when, with intent to discriminate against him, they removed him illegally from jail and beat him to the point of unconsciousness. From these injuries decedent died a few days later on April 25, 1958. The decedent was gainfully employed at a monthly salary of $300 and had a life expectancy of 33.68 years. Damages in the total sum of $180,448 were sought.[1] The suit was filed nearly two years later, April 19, 1960.

Jurisdiction was formally invoked under 28 USCA §1331 as a suit with requisite jurisdictional amount arising under the Constitution and laws of the United States and also under 28 USCA § 1343 (1), (2), (3) and (4).[2] In connection with the latter the complaint made specific reference to 42 USCA § 1983,[3] § 1981,[4] and

1. The complaint formally broke down this demand as follows: (a) for "savagely brutal injuries * * * as well as his illegal arrest," $10,000; (b) "For general damages for the death" of decedent, $120,448; and (c) "Smart Damages for aggravation, suffering, mental anguish, and other punitive damages," $50,000.
2. " § 1343. Civil rights and elective franchise
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
"(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.
"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." As amended Sept 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.
3. 42 USCA § 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

§ 1985(3).[5] While 42 USCA § 1986[6] was not expressly cited, the complaint, construed as it must be, *Conley v. Gibson*, 1957, 355 U.S. 41 at 45-46, 78 S.Ct. 99, 2 L.Ed. 2d 80, was sufficient to invoke it as well. *Baldwin v. Morgan*, 5 Cir., 1958, 251 F.2d 780 at 790, 791; *Lewis v. Brautigam*, 5 Cir., 1955, 227 F.2d 124 at 128.

The law has long and frequently stated and restated its apologia that claims for injury to the person die with the victim and that amelioration of the harshness of this principle must come from legislation. *Van Beeck v. Sabine Towing Co.*, 1937, 300 U.S. 342, 57 S.Ct. 452, 81 L.Ed. 685, 1937 AMC 311; *Emerson v. Holloway Concrete Products Co.*, 5 Cir., 1960, 282 F.2d 271 at 274, cert. denied, 364 U.S. 941, 81 S.Ct. 459, 5 L.Ed. 2d 372.

We are dealing, therefore, with statutory interpretation. If that process were merely one of searching for an express, categorical provision, the case would quickly end, and for that matter, so would a considerable amount of the business of judging. For it has to be acknowledged that save for § 1986, note 6, *supra*, which refers specifically to "legal representatives" of the person injured and a one-year right of action for $5,000 damages for "death * * * caused by * * * wrongful act and neglect," the other sections do not expressly refer to actions for death or the survival of claims arising from civil rights violations. It then becomes a question whether in these statutes or related acts Congress has impliedly established a right of survival.[7]

Relevant to that search, of course, would be the question whether the statutes under scrutiny not only fail to prescribe survival but, on the contrary, reflect a purpose negativing survival. That approach epitomizes one of the arguments vigorously pressed in support of the District Court's judgment. The defendants point to the fact that in § 1983, note 3, *supra*, the civil sanction afforded prescribes that the violator "shall be liable to the *party injured.*" Likewise, they urge that § 1985(3), note 5, *supra*, accords the right of "an action for the recovery of damages" to the "party so injured or deprived." On these rather precise words it is then argued that this reflects a careful discriminating selection by Congress. Consequently, the argument runs, Congress purposefully extended the sanction of a civil damage suit only to the person who was the immediate physical victim of such violations. Additional strength to this contention is then found in § 1986, note 6, *supra*, which expressly recognizes survival and makes provision for suit after death. This is the assertion of the familiar and related rules that specific mention with respect to a specific situation impliedly excludes application generally or elsewhere.

Of these and similar approaches, we should give heed to the words of Mr. Justice Jackson for the Court in *SEC v. Joiner Leasing Corp.*, 1943, 320 U.S. 344 at 350-51, 64 S.Ct. 120, 88 L.Ed. 88. "Some rules of statutory construction come down to us from sources that were hostile

party injured in an action at law, suit in equity, or other proper proceeding for redress." R.S. § 1979.

4. 42 USCA § 1981. "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." R.S. § 1977.

5. 42 USCA § 1985(3). "If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." R.S. § 1980.

6. 42 USCA § 1986. "Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action;* and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued." R.S. § 1981.

See note 12, infra, as to portion marked with *.

7. The term is here used broadly as an abbreviation to include both of the district claims for (a) the damages sustained by a decedent during his lifetime and (b) damages sustained by his survivors as a result of his death. See note 15, infra.

toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." [8]

In that light—and without regard to the final question whether survival was adequately accorded by some statute—it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death. The policy of the law and the legislative aim was certainly to protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple.[9]

We have fresh evidence of the broad and sweeping aims of Congress with specific regard to § 1983. *Monroe v. Pape*, 1961, . . . U.S. . . ., . . . S.Ct. . . ., 5 L.Ed. 2d 492, makes an extensive re-examination of the legislative history and summarizes its purpose in this way. "The debates are long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claim of citizens to the enjoyment of rights, privileges, and immunity guaranteed by the Fourteenth Amendment might be denied by the state agencies." . . . U.S. . . ., 5 L.Ed. 2d 492 at 501. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the State and the state remedy need not be first sought and refused before the federal one is invoked." 5 L.Ed. 2d 492 at 503.

With a clear congressional policy to protect the life of the living from the hazard of death caused by unconstitutional deprivations of civil rights, where then do we find the statutory machinery to give effective redress after death? We find it unnecessary to pass on the historically documented contention [10] of the plaintiff that § 1986, note 6, *supra*, by its incorporating reference to the "second section of this act" [11] grants a general right of action either "to the person injured" or "his legal representatives" in the broad terms of the first clause without the time or monetary limitations set forth in the *proviso*.[12] This is so because we are of the clear view that Congress adopted as federal law the currently effective state law on the general right of survival. This was done by § 1988.[13] With respect

8. See note 8, 320 U.S. 344 at 351, which cites Supreme Court cases rejecting for particular statutes the "ejusdem generis" and the "expressio unius est exclusio alterius" maxims.

9. Compare the criminal sanction, 18 USCA § 242 for wilful deprivations, paralleling the civil sanction under § 1983. Baldwin v. Morgan, 5 Cir., 1958, 251 F.2d 780 at 789, notes 10 and 11. The celebrated case of Screws v. United States, 1945, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495, recognized criminal accountability for violations resulting in death of the victim. So, too, did Crews v. United States, 5 Cir., 1947, 160 F.2d 746.

10. This argument stresses remarks made by Representative Poland, a member of the Second Joint House Senate Conference Committee proposing a substitute for the Sherman Amendment; see Congressional Globe, 42nd Cong. 1st Sess. at 804; Representative Shellaberger, Manager of the bill in the House, ibid at 805; and Senator Edmunds, sponsor in the Senate, ibid at 820; see also ibid at 807.

On this thesis the plaintiff overcomes the one-year limitation period by contending that this refers to the "section" and not to the Act, other portions of which have been held to be controlled by the appropriate state statute of limitations, citing O'Sullivan v. Felix, 1914, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980; Johnson v. Yeilding, N.D. Ala., 1958, 165 F.Supp. 76. Countering this defendants urge that the phrase "this section" in the § 1986, note 6, supra, occurs in the codification but not in the original Act, so that under the Codification Act, Vol. 1-4 USCA pp. 3, 4, the original prevails. United States v. Hirsch, 1879, 100 U.S. 33 at 35, 25 L.Ed. 539; United States v. Bowen, 1880, 100 U.S. 508 at 513, 25 L.Ed. 631.

11. This phrase appears in the recodification, see note 6, supra, as "mentioned in section 1985 of this title." It incorporates § 1985(3), note 5, supra.

12. The portion appearing after * in present § 1986, note 6, supra, was enacted as follows: "Provided, That such action shall be commenced within one year after such cause of action shall have accrued; and if the death of any person shall be caused by any such wrongful act and neglect, the legal representatives of such deceased person shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of such deceased person, if any there be, or if there be no widow, for the benefit of the next of kin of such deceased person."

13. As recodified it now reads:

42 USCA § 1988. "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are

to vindication of federally guaranteed civil rights, Congress provided that in all cases where the laws of the United States are "suitable to carry the same into effect" but are "not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law" then the "common law, as modified and changed by the constitution and statutes of the State" in which the federal court is sitting "so far as the same is not inconsistent with the Constitution and laws of the United States" are to "be extended to and govern * * * the trial and disposition" of the case.

In determining the impact of this section on our specific problem, we should bear in mind again that we are concerned solely with statutory interpretation. Without a doubt Congress has the constitutional power to spell out a comprehensive right of survival for civil rights claims. The question is therefore one of the everyday variety: has it done so by this means? Since legislation has been the invited response to ameliorate the harshness of the general rule against survival in the case of injury to person, it is certainly natural that, with respect to federally promulgated rights, the approach is hospitable toward finding a plausible, reasonable basis upon which to sustain an effective enforceable right. Certainly for the last two decades Judge Cardozo's words in *Van Beeck v. Sabine Towing Co., supra,* 300 U.S. 342 at 350-51, set the tone. "Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied. There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source of law, a new generative impulse transmitted to the legal system."

At every turn the Supreme Court, by drawing on available state legislation or giving a broad liberal effect to federal statutes has found a way to make compensation effective despite statutory language which might have made non-survival plausible, if not probable, during an earlier era. In *Just v. Chambers,* 1941, 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed. 903, the Court as to the related problem of survival of the cause of action after the death of the tortfeasor held that admiralty could call upon the local (Florida) law. In *Cox v. Roth,* 1955, 348 U.S. 207, 75 S.Ct. 242, 99 L.Ed. 260, the question was the survival of a claim under the Jones Act, 46 USCA § 688, on the death of the tortfeasor. Since liability imposed against the vessel owner under the Jones Act rests on the incorporation of FELA, the Court was faced squarely with the bald fact that the basic Act had no provision for survival against the tortfeasor. Nevertheless the dominant approach of the Court was that "* * * welfare legislation * * * is entitled to a liberal construction to accomplish its beneficent purposes." 348 U.S. 207 at 210. What could be said of the "extreme harshness of the old common-law rule abating actions on the death of the tortfeasor" [14] may be more than said as to the victim and his dependents. Likewise, may it be said that this rigor of the common law "flies in the face of the express congressional purpose to provide for" [14] protection of citizens against unconstitutional deprivation of their fundamental civil rights. The Court's awareness there that "literal application of the words of the FELA would result in the denial of recovery against the personal representative of the tortfeasor" [14] was not permitted to "frustrate the congressional purpose."[14] Nor should it here.

When we examine § 1988 in the dual spotlight of the historical major aim of the civil rights legislation, *Monroe v. Pape, supra,* and the tolerant, hospitable construction to ameliorate the hardships of the common law rule, there is ample basis for concluding that this statute fills the gap. In fact it is Georgia law, not federal law, which fills the gap.[15]

deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." R.S. § 722. Acts Apr. 9, 1866, c. 31, § 3, 14 Stat. 27; May 31, 1870, c. 114, § 18, 16 Stat. 144.

This was originally enacted as § 3 of the Act of 1866. The declaration of substantive rights was contained in § 1 of the Act of 1866 which together with § 16 of the Act of May 31, 1870 is presently codified as 42 USCA § 1981, see note 4, supra. As to § 1988, see Monroe v. Pape, 1961, . . . U.S. . . . at . . ., . . . S.Ct. . . ., 5 L.Ed. 2d 492 at 541, and note 79 (dissenting opinion) which sets out portions of its original text.

14. From 348 U.S. 207 at 209 and 210.

15. § 3-505 (1958 pocket part) of the Georgia Code provides:

"No action for a tort shall abate by the death of either party, when the wrongdoer received any

There is, first, nothing unusual about Congress adopting state law of the several states as federal law. It has done this, for example, in the Outer Continental Shelf Lands Act, 43 USCA § 1331-43 and especially § 1331(a)(2), *Guess v. Read*, 5 Cir., . . . F.2d, . . . [No. 18466, May 18, 1961]. Likewise it has done so in the Federal Torts Claims Act where substantive liability of the Government is determined by state law. 28 USCA §§ 1346(b), 2671-80. Similarly, priority as between private contract liens and the Government's lien for federal taxes is governed in large part by state law on recording and perfection. 26 USCA § 6323. By 18 USCA § 13 Congress has, with respect to so-called special maritime and territorial jurisdiction of the United States under § 7, made an act a federal crime if it would have been punishable as a crime at the time of the act under the laws of the state, territory, possession or district where committed. Only will such adoptive statutes encounter constitutional impediments.[16]

And since the power of Congress to legislate would generally be coextensive with the power of the Judiciary to fashion substantive law within an admitted field of federal competence, there is a vast body of law furnishing additional evidence that Congress considered it proper to look to the states in supplying the necessary survival mechanisms to make the civil rights policies effectual. This body of law is that by which recovery for death from injuries occurring on navigable waters is allowed in admiralty on the basis of local state death statutes. This serves as a significant analogy for our problem of reading the congressional intention of § 1988. For the development of this working principle in an area where the substantive rights are within the Supremacy Clause, *Kossick v. United Fruit Co.*, 1961, . . . U.S. . . . S.CT. . ., . . . L.Ed. . . ., [No. 96, April 17, 1961] and therefore as "federal" as under the civil rights statutes, has not been too troubled by whether the state law thereby adopted is substance or procedure. Indeed, while the conceptual status is far from clear, it would be doctrinaire to assert that this wholesome end rest upon the motion that nothing but state procedural law is thereby adopted.[17] The lesson that this judicial inventiveness teaches is, of course, that if one coordinate branch of the Federal Government conceives it to be desirable and permissible to draw on local state law to give its federally-declared rights effective value, then Congress may have done likewise here. And in doing so, it was not necessary that Congress either acted—or thought about it—in terms of substance, procedure, jurisdiction or all three.

Indeed, § 1988 uses sweeping language. It reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes. If the federal law is "suitable to carry the [policy] into effect" resort to local law is not required. On our analysis federal law is not suitable, i.e., sufficient, since it leaves a gap for death in a substantive policy making no distinction between violent injuries and violent death. Since the federal

benefit from the tort complained of; nor shall any action, or cause of action, for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff; and in case of the death of the defendant shall survive against said defendant's personal representative * * *."

Section 105-1302 of the Georgia Code provides for a wrongful death action:

"A widow, or, if no widow, a child or children, minor or *sui juris*, may recover for the homicide of the husband or parent, the full value of the life of the decedent, as shown by the evidence." [Act 1850, Cobb 476: Acts 1855-6 page 155; 1878-9, page 59; 1924, page 60.]

"The full value of the life of the decedent, as shown by the evidence, is the full value of the life of the decedent without deduction for necessary or other personal expenses of the decedent had he lived."

These Georgia statutes prescribe separate and distinct causes of action. See note 7, supra. One is for survival of the decedent's cause of action; the other for injury inflicted upon the survivor. Complete Auto Transit, Inc. v. Floyd, 1958, 214 Ga. 232, 104 S.E.2d 208 at 213; Spradlin v Georgia Ry. and Electric Co., 1913, 139 Ga. 575, 578, 77 S.E. 799 at 800.

16. See, for example, Knickerbocker Ice Co. v. Stewart, 1920, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834; State of Washington v. W. C. Dawson & Co., 1924, 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646, 1924 AMC 403, which involved unsuccessful congressional efforts adopting state compensation acts to overcome Southern Pacific Co. v. Jensen, 1917, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086; see also 50 Am. Jur., Statutes §§ 36-39 at 57-59.

17. The most recent cases are Tungus v. Skobjard, 1958, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed. 2d 524; United New York & New Jersey Sandy Hook Pilots Assn. v. Halecki, 1959, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541; Hess v. United States, 1960, 361 U.S. 314, 80 S.Ct. 341, 4 L.Ed. 2d. 305; Goett v. Union Carbide Co., 1960, 361 U.S. 340, 80 S.Ct. 357, 4 L.Ed. 2d 341. See Thibodeaux v. J. Ray McDermott & Co., 5 Cir., 1960, 276 F.2d 42 at 47, note 6, and Emerson v. Holloway Concrete Products Co., 5 Cir., 1960, 282 F.2d 271 at 281, notes 10 and 11 (dissenting), for a summary of the changing position of the several Justices.

statutory framework is, in the words of the statute, "deficient in the provisions necessary to furnish suitable remedies and punish offenses against" that law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies.

There is nothing in this comprehensive declaration of a purpose to make a policy fully effective which would justify reading the single word "remedies" in a literal sense. It is hardly consistent with the diverse convictions so deeply felt and often spoken by ardent champions of the competing forces in the stormy struggle culminating in the Civil Rights Acts, see *Monroe v. Pape, supra,* to think that they were consciously legislating in terms of the mechanisms or devices generally associated in the lawyer's mind with procedure as such.[18] The term "suitable remedies" had a deeper meaning. Used, as it was in parallel with the phrase "and punish offenses against law," it comprehends those facilities available in local state law but unavailable in federal legislation, which will permit the full effectual enforcement of the policy sought to be achieved by the statutes. And in a very real sense the utilization of local death and survival statutes does not do more than create an effective remedy. This is so because the right is surely a federally protected one—the right to be free from deprivation of constitutional civil rights. The local death or survival statute adopted by reference in this fashion does not add to that substantive right. It merely assures that there will be a "remedy"—a way by which that right will be vindicated—if there is a violation of it.

One further thing should be emphasized. In enacting this legislation by reference to incorporate that of the several states currently in effect when and where a civil rights case would arise, Congress was under no restraint in enacting procedural, i.e., remedial, rather than substantive legislation or vice versa.[19] Consequently, it does not really matter whether in the eyes of the local law the local statute, rule or decision thus incorporated by reference is in the category of substance, or procedure, or mixed.[20] Congress adopts the whole "common law, as modified and changed by the constitution and statutes of the State" without regard to its technical local characterization. From a federal standpoint the only limitation upon the use of such adoptive state legislation, rule or decision is that it is suitable to carry the law into effect because other available direct federal legislation is not adapted to that object or is deficient in furnishing a fully effective redress. Thus § 1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so.

Thus, by a similar if not altogether parallel route, we give to § 1988 a reach equivalent to that accorded by the 8th Circuit recently in *Pritchard v. Smith,* 8 Cir., 1961, . . . F.2d. . . . [No. 16637, April 26, 1961, 29 L.W. 2534], as it dealt with the related problems of survival of a civil rights claim after the death of the tortfeasor.

18. As a statute incorporating merely state procedural mechanisms or devices § 1988 was, at least for actions at law, superfluous as a duplication upon the enactment of the Conformity Act. Section 5 of the Conformity Act of 1872, dealing with methods of instituting and carrying on litigations provided: "The practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the * * * district courts of the United States shall conform, as near as may be, to the practice * * * existing at the time in like causes in the courts of record of the State within which such * * * district courts are held, any rule of court to the contrary notwithstanding." 17 Stat. 196, 197 (1872), 28 U.S.C. § 724. As originally passed this section contained a proviso that "nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof." This clause was dropped in 1878. U.S. Rev. Stat. § 914 (1878). See the discussion of the history of the Act in McCormick & Chadbourn, Federal Courts 484-487 (1957). The Conformity Act was repealed by the 1948 revision of Title 28 of U.S.C. because its provisions were in conflict with the Federal Rules and no longer had any force or effect. See 2 Moore, Federal Practice § 2.04 at 319-331.

19. Congress, of course, was not concerned with any limitation on powers such as it placed on the Supreme Court rule-making power by the Enabling Act. 28 USCA § 2072.

20. The defendants stress Barnes Coal Corp. v. Retail Coal Merchants Assn., 4 Cir., 1942, 128 F.2d 645 at 648, and Gerling v. Baltimore & Ohio Railroad, 1894, 151 U.S. 673 at 692, 14 S.Ct. 533, 38 L.Ed. 311; Michigan Central R. Co. v. Vreeland, 1913, 227 U.S. 59 at 67, 33 S.Ct. 192, 57 L.Ed. 417, which speak in terms of survival as a matter of substantive right, not procedure. These really beg the question. As we view § 1988 it incorporates the right of survival under the state statute as part of the federal Act. It is the federal Act, utilizing state law as it does, which gives this *right*. Therefore it is of no consequence whether survival is classified as a matter of right or procedure.

Since Georgia now provides both for survival of the claim which the decedent had for damages sustained during his lifetime as well as a right of recovery to his surviving widow and others for homicide, see note 15, *supra*, we need not differentiate between the two types of actions. See 16 Am. Jur., *Death* § 61 at 47-48. To make the policy of the Civil Rights Statutes fully effectual, regard has to be taken of both classes of victims. Section 1988 declares that this need may be fulfilled if state law is available. Georgia has supplied the law.

This makes it unnecessary to pass on the alternative grounds of jurisdiction on the basis of diversity against the surety of the Sheriff or pendent jurisdiction. The cause must therefore be reversed and remanded for a trial and other further consistent proceedings. Experience teaches us that we should reiterate that nothing said or unsaid, expressed or implied is a determination, holding or intimation, one way or the other, on the merits of the cause. That is for the trial court on the trial now to be had. *Fontainebleau Hotel Corp. v. Crossman*, 5 Cir., 1961, 286 F.2d 926 at 928; *United States v. Bowen*, 5 Cir., 1961, . . . F.2d . . . [No. 18588, May 2, 1961].

REVERSED AND REMANDED.

Dissent

DeVANE, District Judge, Dissenting:

Convinced as I am that District Judge Bootle decided the issues in this case correctly, I am compelled to dissent from the opinion of Circuit Court Judge Brown, Judge Bootle passed directly upon every issue submitted to him by the parties in the case which did not include the issue upon which this Court holds our decision must turn.

The complaint filed in the case placed no reliance whatever upon 42 USCA 1988. The section was not mentioned in the pleadings. It was an afterthought on the part of counsel for appellant. However, giving full effect to this section, it cannot be held to create a cause of action in this Court based upon the Georgia Survival Statute. Such a holding by this Court constitutes nothing short of judicial legislation.

Sections 1981, 1983 and 1985 (3), 42 USCA are the Civil Rights sections relied upon by plaintiff in the complaint filed herein to sustain this cause of action. Section 1981 creates no cause of action. Sections 1983 and 1985(3) create action for "the party injured" and for no one else.

This is made doubly clear when consideration is given to 42 USCA 1986. This section provides that not only the wrong doers but "every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in Section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do" may be joined as defendants and sued for the wrongful acts complained of. This section specifically provides that if the death of any party be caused by such wrongful act or neglect "the legal representatives of the deceased shall have such action therefor and may recover not exceeding $5,000.00 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased."

This is the only section in the Civil Rights Act that provides for a survival action for the benefit of legal representatives of the deceased. This clearly is sufficient proof that Congress never intended to provide for the survival of a cause of action in case of death of the injured person other than that specified therein. This section goes further and provides that "no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

What this Court is doing in this case is circumventing the purpose and effects of this section by holding that Section 1988 gives to the injured parties the benefit of the Georgia law with reference to survival and by so doing completely avoids the provisions of Section 1986 limiting the amount of recovery specified therein and the statute of limitations as provided therein.

What is most disturbing to me with reference to this decision is that it is further proof of the fact that federal appellate courts are engaging too much in amending the Constitution and laws where, in their opinion, there is need for the amendment, instead of interpreting the laws as given us by the Constitution and the Congress.

I would affirm.

CRIMINAL LAW
Breach of the Peace—Federal Courts

Elmer BROWN, et al. v. STATE of Mississippi.

United States District Court, Southern District, Mississippi, Jackson Division, August 26, 1961, Nos. 3196-3200-Cr.

SUMMARY: Six "Freedom Riders," convicted in a Mississippi county court of a violation of a breach of the peace statute, sought to remove the prosecutions to a federal district court. The federal court remanded the cases because of lack of jurisdiction, holding that the state statute did not destroy or abridge any civil right of any of the individuals.

COX, District Judge.

ORDER

THIS DAY this action came on for hearing on the motion of the respondent, the State of Mississippi, to remand same to the State Court from which it was removed, and the Court finding that this action was removed improvidently and that this Court is without jurisdiction;

It is, therefore, ordered and adjudged that the above styled and numbered action be and same is hereby remanded to the County Court of the First Judicial District of Hinds County, Mississippi, from which it was removed, and that the Clerk of this Court be and she is hereby ordered and directed to mail a certified copy of this Order to the Clerk of the County Court of the First Judicial District of Hinds County, Mississippi.

It is further ordered and adjudged that all Court costs incurred in the removal of this action to this Court be and the same are hereby taxed against petitioner.

ORDERED AND ADJUDGED, this 28 day of August, 1961.

OPINION

The Petitioners invoked 28 U.S.C.A. Section 1443 to remove these criminal prosecutions here from the County Court of Hinds County. The State of Mississippi moved to remand the cases for lack of jurisdiction in this Court. The propriety of the removal is determined from the case made by the record in the State Court. No testimony was adduced here by either party. The Petitioners were convicted in the Justice of the Peace Court on a violation of a State peace statute appearing as Section 2087.5, Mississippi Code 1942. Much inflammatory criticism is leveled at that statute but the statute is a perfectly natural and necessary exercise by the State of a well-known and well-recognized police power. Petitioners endeavor in argument with desperation to convert that statute into a heavily veiled segregation statute. It is likewise attempted by astute counsel to convert this case into a segregation case. Actually this case cannot be treated or regarded by anyone in search of the truth or in quest of justice as a case in anywise or to any extent involving either integration or segregation. Three of the five Petitioners here are white and were arrested in white facilities of some public agency in Jackson. They were arrested and convicted in the Justice of the Peace Court for a wilful breach and violation of this peace statute. As pointed out by Petitioners' counsel in the argument, the State of Mississippi has several segregation statutes which clearly deal with that subject as a part of its local jurisprudence. But Section 2087.5, Mississippi Code 1942, is not such a statute. It is a pure and simple peace law enacted by the Legislature in good faith to assure peace and tranquility among its people. These Petitioners heralded their arrival in Jackson from other states for provocative purposes. Their status as interstate passengers is extremely doubtful. Their destination was Jackson but their objective was trouble. They were arrested and tried according to the local court because of the provocative circumstances under which they appeared at the time in this particular place. They had no civil right to incite a riot or provoke mob violence. The arresting officer promptly and efficiently and very properly discharged his duty in arresting each of these criminals under such circumstances. This Court may not be regarded as any haven for any such counterfeit citizens from other states deliberately seeking to cause trouble here among its people. *Boynton v. Virginia,* 364 U.S. 454, and *Gomillion v. Lightfoot,* 364 U.S. 339, and similar au-

thorities are relied on by Petitioners. Those cases involved instances where citizens were actually divested of their civil rights. Surely the Court has the right to pierce the veil of any statute to determine whether or not it indirectly accomplished that which it could not directly do in such respect. In the Boynton case this bona fide interstate passenger was denied food in the white section of the interstate bus restaurant. In the Gomillion case negro citizens were divested of their right to vote and their right to enjoy the use of their property in the City of Tuskegee by a statute of Alabama which changed the shape and size of the municipality so as to exclude most of the negroes from the now twenty-eight sided municipality. The contrast in such cases with the case at bar does not require analysis or discussion.

This record does not show that this statute destroys or abridges any civil right of either of these Petitioners. *Hull* v. *Jackson County Circuit Court,* 6 C.C.A., 138 F.2d 820. This state statute applies alike to black and white citizens just as it was enforced in the case at bar without distinction as to race or color. It is not without significance that this federal civil rights statute has never been successfully invoked in a case of this kind cited to this Court. An independent research has not revealed any such case in this age of myriad litigation and it must be assumed that this statute was not designed or intended to serve any such purpose or some court would have said so within three quarters of a century. In *Steele* v. *Superior Court of California,* 9 C.C.A., 164 F.2d 781, it was held that a criminal prosecution could not be removed under this statute for a violation of a civil right of the accused by a police officer in making an unlawful search and seizure in violation of his constitutional rights. The Court said that a petitioner in such a case must clearly show a violation of the equal protection clause of the Fourteenth Amendment. Such is the import of *State of Texas v. Dorris,* 165 F.Supp. 738, where the Petitioner sought a removal to the Federal Court under this Section 1443, Title 28 United States Code, on the ground that he could not possibly get a fair trial in the courts of Brooks County for a misdemeanor for which he was charged and the Court said:

> "Since the denial of equal rights which will justify a removal must be the result of the constitution or laws of the state, there is no right of removal where the alleged discrimination against defendant, in respect of his equal rights, is due to illegal or corrupt acts of administrative officers, unauthorized by the state constitution or laws * * * The removal provision under consideration does not contemplate a removal where neither the constitution nor laws of the state deny the litigant his civil rights, but where there is a criminal misuse or violation of the state law by some subordinate officer which results in depriving the litigant of the rights which the state law accords to him. Alleged existence of race prejudice, interfering with a fair trial, is not ground for removal, where the prejudice cannot be attributed to the state constitution or laws. It is not cause for removal that jury commissioners or other subordinate officers have, without authority derived from the constitution or laws of the state, excluded colored citizens from juries because of their race, or excluded from the jury every person, however competent, who belonged to the same political party as the accused."

A careful examination of the authorities cited by able counsel on both sides leads this Court to the inescapable conclusion that it has no jurisdiction because these cases were improperly removed here. The motions to remand these cases are therefore sustained and a proper order may be taken therefor.

This August 26, A. D., 1961.

CRIMINAL LAW
Breach of the Peace—Kentucky

Re Juveniles Apprehended During Integration Demonstrations

Jefferson County, Kentucky, County Court, Juvenile Session, June 3, 1961.

SUMMARY: 397 minors were charged in a Kentucky juvenile court with disorderly conduct and breaches of the peace as a result of their actions during integration demonstrations in Louisville. They argued that the disorderly conduct ordinance was unconstitutionally vague. The court did not accept this argument, because "it is apparent that Kentucky does not put too much stock in the argument of vagueness"; but it did dismiss the charges, ruling that such action would best protect the welfare of the minors, because they had believed that their acts were not public offenses, and no court had expressly ruled otherwise. To define the actions forbidden by the laws in such situations, the court adopted a nine-point code to spell out expressly what conduct would be considered unlawful by that court in future demonstrations.

TRIPLETT, Judge.

MEMORANDUM OPINION
AND ORDER

Five hundred and ninety five apprehensions involving 397 children who have not attained the age of 18 years have been made by the police during the integration demonstrations. The jurisdiction of this Court is sought to be invoked under KRS 208.020, which section pertains to the County Court, sitting in juvenile session. The cases fall presently into three general classifications. They are: (a) a petition has been filed but the case has not been formally docketed, and (b) a petition has been filed and the case has been formally docketed, and (c) no petition has been filed. An appropriate order pertaining to each of the aforementioned classifications will be entered and accompany this opinion.

A necessary prerequisite to this Court assuming jurisdiction over any child is a finding that the child has committed a public offense. All of the children involved here were charged with either disorderly conduct under the general ordinances of the City of Louisville or breach of peace, as found in the Kentucky Revised Statutes. Motions have been made to quash the petitions in 18 of these cases on the grounds that the disorderly conduct ordinance of the City of Louisville is so vague and indefinite that it is void and hence cannot be a public offense. Able briefs by respective counsel, including the Civil Liberties Union, Inc. have been filed on this question. Section 85-8 of the General Ordinances of the City of Louisville provides a penalty for those who are found guilty of disorderly conduct; however, it does not define what it is that will constitute the offense of disorderly conduct. Proponents of the ordinances argue that disorderly conduct is a common term, it is clear in its meaning and therefore the ordinance is not void for indefiniteness.

There have been a few appellate decisions on the question and these are not very helpful. For example, see *Collins vs. City of Norfolk, 187 Va. 1, 41 SE 2d 448* (upholding a similar ordinance) and *Griffin vs. Smith, 184 Ga. 871, 193 SE 777* (striking down a similar ordinance). Although I personally think that the ordinance is loathesome and am of the opinion that the aldermen should revise it and provide some definite standards, I am mindful of the rule that if there is any other basis upon which to decide a controversy other than declaring a Statute or an ordinance unconstitutional, the Court should do it. Also lower courts should proceed slowly in ruling on constitutional questions, because of the lack of uniform acceptance of its ruling. The insidiousness of the ordinance is that what might be disorderly conduct to one judge might not be to another, and what might be to one on Monday might not be on Tuesday. Also, it is apparent that Kentucky does not put too much stock in the argument of vagueness and indefiniteness. In that respect, see *McDonald vs. Commonwealth of Kentucky, Ky. 331 SW 2d 716.* There the Kentucky Court of Appeals rejected an argument that the statute providing for contributing to the delinquency of a minor was void for indefiniteness. The following language in that opinion is significant:

"It is impossible to detail all of the acts

which could conceivably fall within the condemnation of the Statutes as delinquencies or contributing to the delinquency; hence, it was necessary to use general terms."

A prerequisite to adjudging a child to be a delinquent in Kentucky is a finding that he has committed a public offense. Once this finding is made, then the Court may proceed to make one of several dispositions. A finding that a child has, however, committed a public offense, does not necessarily render him delinquent. Therefore even if the Court found that a child had violated some statute or committed some common-law offense, then an order of dismissal would not be inconsistent if the Court was of the opinion that the welfare of the child or the security of the community did not demand a different disposition. I am satisfied that in a vast majority of these cases that the particular child involved did not believe he was committing a public offense while seeking, what in his opinion, was a just moral goal. Undoubtedly, in many of the incidents, public offenses were committed. However, at the time the incidents took place, neither this Court nor any other Court in Kentucky or Jefferson County had expressed itself on what it perceived to be a violation of the law or permissible conduct under these circumstances. For that reason, if public offenses were committed, the blame cannot rest entirely upon these children, because there was, indeed a conspicuous lack of standards and guides for this type of conduct. Far more culpable in my opinion are adults who have encouraged these children to engage in demonstrations and other activities likely to lead to their apprehensions. A significant difference between a child and an adult is maturity of judgment. Those who criticize the police for mass arrest forget the ever-present danger attendant to any mass demonstration. This is particularly the case when the participants therein are children unsupervised by any responsible adult. Therefore, I am going to dismiss the cases against all children where there have been petitions filed and further rejected any petitions offered on the grounds that I do not find it in the interest of the child or in the welfare of the community to proceed further on these cases. An appropriate order will be entered in each child's case.

Subsequent to the last mass arrest, an injunction suit was tried before the Hon. Blakey Helm, Judge of the Jefferson Circuit Court, Chancery Branch, Third Division, styled *Robert F. Whitehouse, et al vs. Frank L. Stanley, Jr., et al, CR.* 572444. Certain conclusions of law were made, part of which I adopt for the purpose of prescribing guides for any future conduct in this area by children or by adults. The particular findings I adopt are in addition to the conclusions of law, which I make and are hereinafter set out:

1. Individuals have the right to seek service at a place of business open to the public.

2. No person has the right to enter a place of business open to the public for the purpose of adverse demonstrations or disturbances.

3. No one has the right to enter a place of business for the purpose of engaging in adverse disturbances or disorders, or for the purpose of blocking entrances, exits, aisles, lobbies or doors of public places.

4. People do not have the right to force entrance into places of business or to intimidate, harrass, annoy or disturb customers or other prospective customers or to prevent customers or prospective customers from entering or leaving places of business.

5. People do not have the right to annoy, interfere with or insult owners and operators of businesses open generally to the public or their employees, or representatives, in the operation of their respective businesses or to urge or incite persons to such action.

6. People do not have the right to remain inside a man's place of business when he has been requested to leave by the owner or his authorized representative.

7. Children who engage in or commit any of the foregoing shall be deemed to have committed a breach of peace.

8. Any adult who knowingly encourages, aids, causes or in any manner, contributes to a child committing or participating in any of the foregoing, shall be deemed guilty of contributing to the delinquency of a minor. (See *McDonald vs. Comm. of Ky., Ky. 331 SW 2d 716).*

9. These standards shall apply only to a privately owned and operated business in local commerce. They do not apply to a business engaged in interstate commerce or one involving public accommodations engaged in interstate commerce. *William vs. Howard Johnson's Restaurant, 268 Fed. 2d 845)*

Sanction for the foregoing standards and guides will be found in *Hughes vs. Superior*

Court of California, 339 U.S. 460, 94 *Lawyers's Edition* 95. There the Supreme Court of the States rejected a contention that enjoining Negroes from picketing a store to compel hiring Negroes in proportion to Negro customers violated the fourteenth amendment to the United States Constitution.

Nothing in the foregoing should be construed to abrogate the constitutional right of peaceful picketing and peaceful protest. While I personally believe it is wrong to treat any human being differently solely because of the color of his skin, I am constrained to observe that a more permanent and lasting relationship can be achieved in this area by example and industry rather than by force. It is a traumatic experience for any child to be apprehended and placed in the back of a patrol wagon, whether his conduct was within the sanction of the law or not. Also, it is dangerous for a child to be inculcated with the idea that a just end entitles one to use a forceful means.

CRIMINAL LAW
Breach of the Peace—South Carolina

The STATE v. Willie Sam RANDOLPH et al.

Supreme Court of South Carolina, August 23, 1961, No. 4717, 121 So.2d 349.

SUMMARY: Twenty-six individuals were charged in a South Carolina magistrate's court with "conspiring to breach the peace" because of, according to newspaper reports, actions connected with sit-in demonstrations. At trial, defendants argued that the charge was too vague to defend against, but the court overruled the contention and convicted them. On appeal, the South Carolina Supreme Court reversed and remanded the case for retrial, holding that the charge was too general in that it neither stated the facts constituting the crime charged nor pointed out any particulars of the crime allegedly contemplated.

PER CURIAM.

The twenty-six appellants were convicted in the Magistrate's Court of "conspiring to breach the peace." Each was sentenced to pay a fine of $100.00 or to imprisonment for a period of thirty days. Their conviction was sustained by the Circuit Court. On the appeal here, they raised four questions but the only one we need decide is whether the Court erred in refusing a motion at the commencement of the trial to require the State to make the warrant more definite and certain by alleging facts which would enable appellants to understand the nature of the offense with which they were charged.

No indictment is required in the Magistrate's Court. Section 17-401 of the 1952 Code; State v. Langford, 223 S. C. 20, 73 S. E. (2d) 854. Here, as is customary, appellants were tried on a warrant which was based on an affidavit of the Sheriff of Sumter County. In this affidavit he avers that "on or about the 4th day of March, 1960, and at divers times before and since," appellants "did combine, confederate and conspire, together one with the other, to commit a breach of the peace, in the City and County of Sumter, State of South Carolina, against the form of the statute in such case made and provided and against the peace and dignity of the said state." In the warrant issued by the Magistrate it is charged that appellants "did commit the offense of Conspiracy to Breach the Peace, all of which is against the form of the statute in such case made and provided, and against the peace and dignity of the State."

When the case was called for trial, appellants moved "to dismiss the warrant and to quash the information on the ground that on its face it does not plainly and substantially set forth the offense charged." This motion was refused. Counsel for appellants then again stated to the Court that the charge was entirely too vague, indefinite and general to enable their clients to

make a proper defense and moved that the State be required to amend it so as to set out more particularly the manner and means by which the alleged offense was committed. This motion was likewise refused and the only amendment made was to add, with respect to the time of the offense, the words "the exact date being unknown to the State."

In determining whether appellants were sufficiently informed of the charge they were required to meet, it will be helpful to first consider the elements of the offenses named in the warrant. In State v. Ameker, 73 S. C. 330, 53 S. E. 484, the Court stated that conspiracy "is rather described than defined, and the description which seems to have the widest recognition and approval by the authorities declares a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." This definition has been approved in several later cases. State v. Davis, 88 S. C. 229, 70 S. E. 811; State v. Hightower, 221 S. C. 91, 69 S. E. (2d) 363. In 1957 a statute was enacted defining the offense as follows: "The crime known to the common law as conspiracy is hereby defined as a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object, or an object neither criminal nor unlawful by criminal or unlawful means." 50 St. at L. 58, Section 16-550 of the 1960 Cumulative Supplement to the 1952 Code. This statutory definition was referred to in the recent case of State v. Jacobs, 238 S. C. 234, 119 S. E. (2d) 735.

Breach of the peace is a common law offense which is not susceptible of exact definition. It is a generic term, embracing "a great variety of conduct destroying or menacing public order and tranquillity." Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 128 A. L. R. 1352. The following is quoted with approval in Lyda v. Cooper, 169 S. C. 451, 169 S. E. 236: "In general terms, a breach of the peace is a violation of public order, a disturbance of public tranquillity by any act or conduct inciting to violence." Also, see State v. Langston, 195 S. C. 190, 11 S. E. (2d) 1.

Article 1, Section 18 of the Constitution of this State provides that in all criminal prosecutions the accused shall have the right "to be fully informed of the nature and cause of the accusation." Section 43-111 of the 1952 Code is in conformity with this constitutional mandate. It reads: "All proceedings before magistrates in criminal cases shall be commenced on information under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." Section 43-112 provides: "The information may be amended at any time before trial."

Proceedings before a magistrate are summary in nature. Section 43-113 of the 1952 Code. His jurisdiction to try criminal cases is confined to minor offenses. Many of our magistrates are without legal training. In the preparation of warrants they are not required to conform to the technical precision required in indictments. Duffie v. Edwards, 185 S. C. 91, 193 S. E. 211. But it does not follow that the accused may be denied those fundamental rights essential to a fair trial, among which is the right to be informed of the nature of the offense charged against him. In McConnell v. Kennedy, 29 S. C. 180, 7 S. E. 76, the Court stated that the manifest object of the statute now forming Section 43-111 of the 1952 Code was "to require that the offense with which a party was charged should be so set forth, 'plainly and substantially', as would enable the party accused to understand the nature of the offense with which he was charged, so that he might be prepared to meet the charge at the proper time." In Town of Honea Path v. Wright, 194 S. C. 461, 9 S. E. (2d) 924, the Court said: "Without doubt, the administration of the law, and the rights of persons charged with crime can best be served by a due observance of statutory requirements. It is the constitutional right of a person charged with a criminal offense to be fully informed of the nature and cause of the accusation. Article I, Section 18 of the Constitution." In Town of Mayesville v. Clamp, 149 S. C. 346, 147 S. E. 455, Justice Blease, later Chief Justice, stated in a concurring opinion: "While an accused may be arrested on a warrant that does not fully inform him of the nature and cause of the accusation, he may, when he is brought to trial, demand the information he is entitled to have under the provisions of Section 18 of Article 1."

While the warrant here was not void, we think it was defective in that the charge was entirely too general. All that can be found in the affidavit and warrant is the designation of the offense by name, which is a mere legal conclusion. No facts constituting the alleged

offense are stated. No particularity is given as to the contemplated crime. As previously pointed out, breach of the peace embraces a variety of conduct. Just what type of conduct is it claimed that appellants agreed to engage in which would menace public order and tranquillity? What did they conspire to do which was calculated to provoke violence? We think the Court erred in not requiring the State to make the charge more definite and certain by giving such information as would enable appellants to understand the nature of the offense named in the warrant.

The sentences imposed by the Magistrate are set aside, the order of the Circuit Judge is reversed, and the case is remanded for a new trial as to all appellants.

CRIMINAL LAW
Habeas Corpus—Mississippi

In the matter of the Application of Elizabeth Porter WYKCOFF for a Writ of Habeas Corpus.

United States District Court, Southern District, Mississippi, Jackson Division, June 29, 1961, Civil Action No. 3140, 196 F.Supp. 515.
United States Court of Appeals, Fifth Circuit, July 22, 1961, _____F.2d._____.
United States Supreme Court, July 26, 1961.

SUMMARY: A "freedom rider," convicted of breach of the peace in a Mississippi justice of the peace court, applied to a federal district court for a writ of habeas corpus. Petitioner had not appealed her conviction to higher state courts before applying for the writ, but argued that hers was an emergency situation, and that she should not have to follow the usual appeal procedure because of the short duration of her sentence. The district court dismissed the petition, holding that further state remedies were available to petitioner without cost, and that a federal statute specifically forbade the federal courts to grant a writ of habeas corpus unless a petitioner had exhausted all state remedies. The court did, however, retain jurisdiction in the case until petitioner has an opportunity to pursue the remedies provided by the state.

The Fifth Circuit Court of Appeals denied petitioner's motion for permission to appeal immediately upon the original papers filed in the district court, holding that she had shown neither a financial inability to prepare a record for appeal nor an inability to test her detention by habeas corpus proceedings in the state courts.

Mr. Justice Black denied a petition to the United States Supreme Court, ruling that petitioner's constitutional rights were protected by the state remedies.

District Court Opinion, Order

ORDER DENYING APPLICATION
FOR WRIT OF HABEAS CORPUS

ELIZABETH PORTER WYCKOFF, the petitioner herein, having applied for a writ of habeas corpus in this matter, and the said application having come on to be heard before me on the 21st day of June, 1961,

Now, upon the petition and the answer thereto and after hearing WILLIAM M. KUNSTLER, one of the attorneys for the petitioner, in support of said application, and J. A. TRAVIS, JR. and TOM H. WATKINS, the attorneys for respondent, in opposition thereto, it is

ORDERED that the petition of ELIZABETH PORTER WYCKOFF for a writ of habeas corpus is denied on the ground that said petitioner

has failed to exhaust her state remedies, and it is further

ORDERED that this court will retain jurisdiction of the within proceeding pending the exhaustion by petitioner of her state remedies and it is further

ORDERED that conformed copies of this order be served upon the attorneys for respondent.

ORDERED AND ADJUDGED on this 29th day of June, 1961.

J. C. Mize
United States District Judge

MIZE, District Judge

This matter is before the court upon a petition of Elizabeth Porter Wyckoff for a writ of habeas corpus and upon the answer J. R. Gilfoy, as Sheriff of Hinds County, Mississippi. The petition for a writ of habeas corpus was filed with the Court and the Court issued a show cause order to the Sheriff of Hinds County why the writ should not issue and he responded thereto and the matter came on for hearing.

The petitioner alleged that she was a citizen of the United States, a resident of the state of New York, and she alleged that she is now imprisoned and restrained of her liberty in the Hinds County Jail in the State of Mississippi in the custody of J. R. Gilfoy, Sheriff of Hinds County, Mississippi. She alleged that the cause of such imprisonment is not known to her, but that she is held as a county prisoner under the exclusive jurisdiction or custody of said Sheriff pursuant to a judgment of the Municipal Court of the City of Jackson, Hinds County, and that she was convicted of violating Sec. 2087.5 of the Mississippi Code of 1942 as amended, and by virtue of that conviction was committed to imprisonment in the Hinds County Jail for a period of four months and fined $200.00. She further alleged that the judgement, sentence and commitment were void and without authority of law, and that her imprisonment was a denial of due proceess of law under the Fifth and Fourteenth Amendments to the Constitution of the United States, and also in violation of the First and Fifteenth Amendments to the Constitution of the United States; that the Court rendering the judgment of conviction was without jurisdiction.

The Respondent, Gilfoy, answered the petition and set up as a defense thereof that he held the custody of the Petitioner by virtue of a judgment of conviction of breach of the peace in Hinds County, Mississippi and the commitment issued by the Ex Officio Justice of the Peace of that District, and denied all the other material allegations of the petition.

The Petitioner, who is a white woman, was convicted of a violation of Section 2087.5 of the Code of 1942 and the amendments thereto, after a fair trial in the Ex Officio Justice of the Peace Court of James L. Spencer. The Sheriff further set up as affirmative matter a certificate of the Ex Officio Justice of the Peace wherein he certified that the Petitioner was represented in his court by four attorneys of her own choice and that the Petitioner, along with counsel for the State, announced ready for trial. She was tried by the Court upon evidence and, after argument, was convicted by the Ex Officio Justice of the Peace, and Respondent also set up as a defense that the Petitioner had not exhausted her state remedies which were available to her and that there was no emergency existing in her behalf to justify the disregarding of the plain mandate of the Act of Congress, being Section 2254, Title 28, USCA.

Counsel for Petitioner urges that if the writ should be denied, the Court should retain jurisdiction until she has had an opportunity to avail herself of the remedies afforded by the laws of the State of Mississippi.

The Court has considered the oral argument of the attorneys and their very able briefs filed in this case, and is of the opinion that the writ should be denied. In granting the writ the Court would be compelled to disregard and ignore the plain language of Section 2254 of Title 28 of the United States Code, which provides that a Federal Court shall not grant a writ of habeas corpus to one who is held under a commitment of the State Court unless the Petitioner has exhausted the state remedies. The Petitioner admits in her petition that she has not exhausted them, but urges the Court that the present petition is an emergency and that the Act of Congress should be disregarded by the Court. With this contention I cannot agree. There is no emergency to justify a disregard of the Act of Congress. Petitioner alleges that she is unable to pay the cost of exhausting her remedies. In Mississippi this is not an excuse or justification. The statutes of Mississippi provide that any person who is unable to pay the cost or give bond therefor may file a pauper's oath and the appeal will be perfected immediately without cost. Section 1203, Mississippi Code of 1942.

The Court which convicted the Petitioner is a State Court known as an Ex Officio Justice of the Peace. The law of Mississippi provides that the Police Justice of a city of over 10,000 shall also be Ex Officio Justice of the Peace, authorized to try all misdemeanors committed within the limits of the municipality. See Section 3374-103, Mississippi Code of 1942 and amendments thereto. The petitioner was convicted June 5, 1961. Under Sections 1175, 1202 and 1203 of the Code of 1942 as recompiled, she had the right of appeal immediately to the County Court, where she would be entitled to a trial de novo by a jury, if she desired one and if convicted there would then be entitled to an immediate appeal to the Circuit Court, where the case would be tried on the record, and if affirmed there she would be entitled to an appeal to the Supreme Court of the State. These remedies are speedy and exhaustive, and even go further than in many states. The statutes give the trial court the right to release one without bond pending appeal, upon proper petition and showing that one is unable to give bond. Petitioner further contends that she was denied due process of law because she did not have a jury trial. This contention is without merit. When one is tried in a Justice of the Peace Court, as was petitioner, he is entitled to trial by jury if he requests it, but the record shows that Petitioner went to trial represented by able counsel without calling for a jury.

Petitioner contends through her counsel that this in an effort to prevent integration and to enforce segregation. This contention is without merit. Petitioner was not convicted of a violation of any law with reference to integration or segregation, but was convicted of a breach of the peace in refusing to disperse and move on under the direction of a lawful officer. The section of the Code above referred to provides that it is a misdemeanor to congregate with other persons or crowds with the intent to provoke a breach of the peace and to refuse to disperse or move on upon the order of a lawful officer. This statute, or one similar thereto, is common to many states in the Union and is a very wise exercise of police powers of the state. Petitioner's own state, New York, has a very similar statute and with the same purpose as is the Mississippi statute. See Section 722, New York Penal Law.

It is not necessary in the present hearing to determine the constitutionality of this statute or similar statutes throughout the nation for the reason that Congress has specifically forbidden the Federal Courts to grant a writ of habeas corpus unless a petitioner has exhausted all state remedies. That section of the Act of Congress reads as follows: "An applicant shall not have been deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." The Federal Courts as well as Congress are reluctant to interfere with the enforcement of the criminal statutes of a state, but leave that function to appropriate action of each state. The wisdom of this statute is exemplified by oral argument of counsel for petitioner when he refers to the bloodshed that occurred in Montgomery. No such occurrences happened in Mississippi, but had it not been for the orderly enforcement by the officers of the State of Mississippi under the provisions of this statute, such occurrences could have happened. By virtue of the power of this statute the officers are authorized to require assemblies which are likely to provoke a breach of the peace to move on, and if one refuses so to do, he may be arrested for violation of the statute.

Counsel for Petitioner, upon his request for the Court to retain jurisdiction even though the writ is denied, cites the case of Duffy v. Wells, 201 Fed. (2) 503. Under this authority I agree that this case is an appropriate one for the Court to retain jurisdiction, but deny the writ. As heretofore stated, the Federal Courts are very reluctant indeed to interfere with the ordinary process of a State Court involving state matters. See Davis v. Burke, 179 U. S. 399; Ex Parte Hawk, 321 U. S. 114; Stack v. Boyle, 342 U. S. 1; Brown v. Allen, 344 U. S. 443.

The petition now before the Court for a writ of habeas corpus was heard upon the record without any evidence being introduced by either side. When the case was called by the Court counsel for Petitioner and counsel for the defendant were asked if either side desired to introduce any evidence and each answered that they did not. As heretofore stated, the law is that when a petition for habeas corpus is answered and the allegations of the petition are denied, the burden is upon the Petitioner to prove the allegations of the petition and her right thereunder.

As argued by counsel for Petitioner, the decision in this case will probably be far-reaching

and one of importance. However, the question really is not a new one. It many times has been passed upon by the Courts. A review of the authorities will be appropriate as well as instructive, and I shall therefore discuss some aspects of habeas corpus as they relate to the always delicate question of the relationship between the states and the Federal Government under our dual sovereignty.

It is generally known that the section with which we are now dealing (28 U.S.C.A. Sec. 2254), and the entire Chapter 153 of which it is a part, came into our law under the 1948 recodification of the Judicial Code. The chapter was based to a considerable extent upon studies made by the Judicial Conference of Senior Circuit Judges through its committee on habeas corpus, of which Judge John J. Parker was Chairman. The Supreme Court quoted a portion of the report of that committee in its decision of *Darr v. Buford*, 1950, 339 U.S. 200, 212-214.

The chapter on Habeas Corpus is, therefore, an expression of the attitude of Congress on a subject which, both before and after its passage, was the subject of constant solicitude of the Supreme Court in dealing with Federal-State relationships.

The Fifth Circuit Court of Appeals has in a recent case collected and commented on some of these cases, and I quote a portion of its decision in *Empire Pictures Distributing Co. v. City of Fort Worth*, 273 F. 2d 529, 535 et seq. (The notes, as numbered in the text of that decision, are shown in parentheses):

"Before leaving the discussion of the holdings of the five recent decisions it is desirable to point out that, in 1955,[13] (Amalgamated Clothing Workers of America v. Richman Bros. Co., 348 U.S. 511, 75 S. Ct. 452, 99 L. Ed. 600) the Supreme Court had emphasized the importance of the change in language which the enactment of Title 28 U.S. Code in 1948 brought about. The statute which had theretofore been Sec. 265 of the Judicial Code was revised in the 1948 enactment so as to read:[14] (28 U.S.C.A. Sec. 2283).

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

"Richman had brought a proceeding in a State court of Missouri to enjoin picketing by Amalgamated, alleging that it was being conducted in furtherance of a common-law conspiracy. Asserting that the field had been occupied by the Taft-Hartley Act, 29 U.S.C.A. Sec. 141 et seq. so that only the District Court of the United States had jurisdiction.[15] (28 U.S.C.A. Sec. 1337 and cf. Weber v. Anheuser-Busch, Inc. 1955, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546.) Amalgamated filed action in the federal court to restrain the prosecution of the State court proceedings. The District Court dismissed, the Court of Appeals for the Sixth Circuit affirmed,[16] (211 F. 2d 449.) and the Supreme Court approved their actions, holding that the quoted statute constituted 'Legislative policy * * * in a clear-cut prohibition qualified only by specifically defined exceptions." (348 U.S. 511, 75 S. Ct. 455.) Responding to the argument that to permit State courts to entertain jurisdiction which had so manifestly been vested in the federal courts under Taft-Hartley would bring about a situation where 'delay will not only undercut the legislative scheme, but opportunity for effective union activity may be diminished if not lost,' the Supreme Court said (348 U.S. at pages 518-519, 75 S. Ct. at page 456):

"'The assumption upon which the argument proceeds is that federal rights will not be adequately protected in the state courts, and the "gap" complained of is impatience with the appellate process if state courts go wrong. But during more than half of our history Congress, in establishing the jurisdiction of the lower federal courts, in the main relied on the adequacy of the state judicial systems to enforce federal rights, subject to review by this Court. With limited exceptions, it was not until 1875 that the lower federal courts were given general jurisdiction over federal questions. During that entire period the vindication of federal rights depended upon the procedure which petitioner attacks as so grossly inadequate that it could not have been contemplated by Congress. The prohibition of Sec. 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between the state and federal courts. * * *' * * *

"Finally, it is clear that the federal courts should defer to state courts, because of the long settled principle that a federal court will intervene in a state's enforcement of its criminal laws only in extreme cases. One or two Supreme Court decisions will suffice to show that the principle is deep-rooted in our jurisprudence.

"The two ordinances under attack here create misdemeanors only, punishable by maximum fines of $200.00 for each day's violation. The basic thrust of the Complaint is to procure a federal holding in appellants' favor to escape being subjected to being fined for showing the picture without first obtaining a permit. The action of the Supreme Court in Douglas v. City of Jeannette, 1943, 319 U.S. 157, 63 S.Ct. 877, 87 L. Ed. 1324, illustrates that such a course may not be followed.

"Jeanette had an ordinance requiring those who solicited within its borders to procure a license before beginning such solicitation. A group of Jehovah's Witnesses refused to observe the requirements of the ordinance, being convinced that it was inconsistent with the teachings of their religion. When the city officials asked that they refrain from approaching the residents of the city, they decided upon a mass infiltration and brought one hundred Witnesses into the city to solicit in defiance of the ordinance. It was necessary to call out the fire department to supplement the efforts of the small police force. A score of the Witnesses were arrested and some were convicted, and their cases were affirmed by the state appellate court.[20] (Commonwealth v. Murdock, 149 Pa. Super. 175, 27 A.2d 666.) Taking the case upon certiorari, the Supreme Court of the United States reversed the convictions,[21] (Murdock v. Commonwealth of Pennsylvania, 1943, 319 U.S. 105, 63 S. Ct. 870, 87 L.Ed. 1292.) holding the ordinance unconstitutional.

"Following these convictions some of the Witnesses brought proceedings in the United States District Court to restrain the enforcement of the ordinance, which resulted in the entry of orders enjoining its enforcement.[22] (Douglas v. City of Jeannette, D.C. W.D. Pa., 1941, 39 F. Supp. 32, and cf. Reid v. Borough of Brookville, Pa. D.C.W.D. Pa. 1941, 39 F. Supp. 30.) The Court of Appeals for the Third Circuit reversed,[23] (1942, 130 F. 2d 652.) The Supreme Court granted certiorari[24] (318 U.S. 749, 63 S. Ct. 660, 87 L. Ed. 1125.) and upon hearing affirmed the action of the Court of Appeals[25] (Douglas v. City of Jeannette, 1943, 319 U.S. 157, 63 S. Ct. 877, 882 87 L. Ed. 1324.) stating, 'we find no ground for supposing that the intervention of a federal court, in order to secure petitioners' constitutional rights, will be either necessary or appropriate.' Here is some of the language of the opinion:[26] (319 U. S. at pages 163-164, 63 S. Ct. at page 880).

"'The power reserved to the states under the Constitution to provide for the determination of controversies in their courts may be restricted by federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution. Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. * * *

"' * * * No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate'. ***

"' * * * It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith, or that a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.'

"The principles enunciated in Jeannette have had wide application. One case is worthy of note where the right sought to be safeguarded in the federal court arose, as did that in Jeannette, under a Civil Rights Act, 42 U.S.C.A. Secs. 1981-1983.[27] (Stefanelli v. Minnard, 1951, 342 U.S. 117, 72 S. Ct. 118, 96 L.Ed. 138.) Stefanelli, et al sought federal relief by injunction from threatened use in a state criminal prosecution of evidence admittedly obtained in violation of the Fourth Amendment. Both the

District Court and the Court of Appeals declined to intervene, dismissing the complaints. The Supreme Court affirmed, using this language:[28] (342 U. S. at pages 120-123, 72 S. Ct. at page 120).

"'* * * The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue. The special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law, has been an historic concern of congressional enactment, see, e.g., 28 U.S.C. Secs. 1341, 1342, 2283, 2284(5), 28 U.S.C.A. Secs. 1341, 1342, 2283, 2284(5). This concern has been reflected in decisions of this Court, not governed by explicit congressional requirement, bearing on a state's enforcement of its criminal law. (Citing several cases.) It has received striking confirmation even where an important countervailing federal interest was involved. * * *

"'These considerations have informed our construction of the Civil Rights Act. * * * Regardless of differences in particular cases, however, the Court's lodestar of adjudication has been that the statute "should be construed so as to respect the proper balance between the States and the federal government in law enforcement." * * *

"'If these considerations limit federal courts in restraining State prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun. * * *

"'The consequences of exercising the equitable power here invoked are not the concern of a merely doctrinaire alertness to protect the proper sphere of the States in enforcing their criminal law. If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its farflung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. * * *

"'* * * A proper respect for those relations requires that the judgment below be affirmed.'"

To these decisions quoted from by the Court of Appeals for the Fifth Circuit I would add *Snowden v. Hughes,* 1943, 321 U.S. 1, and *Schwartz v. Texas,* 344 U.S. 199, while acknowledging always that the exhaustive opinion of Mr. Chief Justice Stone in the *Jeannette* case remains the landmark upon which the other cases are chiefly based.

I am not unmindful of the fact that the Court of Appeals for the Fifth Circuit in *Morrison, et al v. Davis, et al,* 1958, 252 F.2d 102, certiorari denied 78 S. Ct. 1008, expressed the idea that *Jeannette* had been modified. The later case of *Empire Pictures* supra expressed no doubt about the binding force of *Jeannette.* Also it is worthy of note that the only appellate court referring to *Morrison v. Davis* does so with disapproval, *Fuqua v. United Steelworkers of America,* 1958, 253 F. 2d 594. Moreover, in the instant case now before the court the Petitioner is being prosecuted, which was not the case in *Morrison* supra.

The treatment given *Jeannette* by the Supreme Court in the last few years, in my opinion, destroys all doubt concerning the continued authority of *Jeannette.*

I find that the Supreme Court has cited *Jeannette* three times since *Morrison v. Davis,* and has affirmed in a per curiam opinion a decision of the Court of Appeals of the Second Circuit which cited *Jeannette* twice.

In *Speiser v. Randall,* 357 U.S. 513, *Jeannette* was cited in a concurring opinion by Mr. Justice Black in support of a different point from that under consideration. *Jeanette* was also cited in support of another point by the majority opinion in *Monroe v. Pape,* 1961, 365 U.S. 167, 171, and by the dissenting opinion of Mr. Justice Frankfurter, ib. at page 206.

Some of the language of the Court in its opinion in *Monroe v. Pape* makes a short discussion of that case desirable. At page 183 of 365 U.S. this statement is made: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws searches and seizures is no barrier to the present suit in the federal court."

It has long been recognized that where a plaintiff is vouchsafed rights in a federal forum or in a state forum, he has the right to choose which forum he will select for the vindication of his rights. Cf. a case which went up from this Court, *Niehaus, et al v. Magnolia Textiles,*

Inc., 5 Cir., 1945, 175 F. 2d 977; same case in State Court of Mississippi, *Magnolia Textiles, Inc. v. Gillis, et al*, S. Ct. Miss., 41 So. 2d 6. But the quoted holding is not contrary in any way with the principles of *Jeannette* and of *Stefanelli*. In each of those cases the effort was to induce the federal court to intervene in state court action before that action had been brought to a conclusion. As long as *Jeannette* and *Stefanelli* stand such a course may not be followed.

That *Jeannette* and *Stefanelli* do still stand is clearly demonstrated in two decisions rendered by the Supreme Court a week after *Monroe v. Pape, Wilson v. Schnettler, et al*, Feb. 27, 1961, 365 U.S. 381. Schnettler, et al were federal narcotic agents who had arrested Wilson under circumstances which made them apprehensive that the evidence seized by them incident to the arrest would not be usable in a federal prosecution. They delivered Wilson, therefore, to the authorities of Cook County, Illinois, where Wilson was indicted. After the state court had denied Wilson's motion for supression of the evidence he brought action in the United States District Court to enjoin the use of the evidence and the federal officers from testifying at the criminal trial in the state court. The District Court granted the motion to dismiss the action and on appeal the Court of the Seventh Circuit affirmed, 275 F. 2d 932. The Court of Appeals cited *Jeannette* as authority for this statement: "Congress and the federal judiciary generally have refrained from interfering with the internal affairs of the States in the administration of justice, subject to review by federal courts of any federal questions involved." (P. 934.) It further cited *Jeannette* as authority for the statement: "The imminence of a trial on a narcotics charge is not such irreparable injury as demands injunctive relief under principles of judicial supervision."

The Supreme Court affirmed, citing both *Jeannette* and *Stefanelli*, using this language at pp. 384-386:

" . . . That court (the Illinois State Court) whose jurisdiction first attached, retains jurisdiction over this matter to the exclusion of all other courts—certainly to the exclusion of the Federal District Court—until its duty has been fully performed, *Harkrader v. Wadley*, 172 U.S. 148, 164; *Peck v. Jenness*, 7 How. 612, 624-625, and it can determine this matter as well as, if not better than, the federal court. If, at the criminal trial, the Illinois court adheres to its interlocutory order on the suppression issue to petitioner's prejudice, he has an appeal to the Supreme Court of that State, and a right, if need be, to petition for 'review by this Court for any federal questions involved.' *Douglas v. City of Jeannette*, 319 U.S. 157, 163. It is therefore clear that petitioner has a plain and adequate remedy at law in the criminal case pending against him in the Illinois court.

"There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' Ponzi v. Fessenden, 258 U.S. 254, 260. Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts and save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . ' *Douglas v. City of Jeannette*, supra, at 163. . . .

" . . . 'If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court (and, we may add, in the ruling of motions to suppress evidence, and in ruling the competency of witnesses and their testimony)—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution.' *Stefanelli v. Minard*, 342 U.S. 117, 123-124."

Mr. Justice Stewart concurred specially in the decision, using these words:

"But I join in affirming the judgment. The petitioner has failed to state a case warranting equitable relief under the standards of *Stefanelli v. Minard*, 342 U.S. 117, 122, and *Douglas v. City of Jeannette*, 319 U.S. 157, 163."

Pugach v. Dollinger, Feb. 27, 1961, 365 U.S. 458, was not unlike *Wilson v. Schnettler, et al*, supra, in its facts, the use of evidence obtained by wire tapping in a prosecution in a State Court. The District Judges to which the two cases had been presented refused to grant injunctive relief, and the Court of Appeals of the Second Circuit affirmed, 277 F.2d 739. In that case the Court relied on both *Jeannette* and *Stefanelli* as binding authority, and the Supreme Court affirmed in a per curiam opinion reading: "The judgment is affirmed on the authority of *Schwartz v. Texas*, 344 U.S. 199, and *Stefanelli v. Minard*, 342 U.S. 117."

From these most recent decisions of the Supreme Court I conclude that, without doubt, *Jeannette* and *Stefanelli* correctly state the law which has through the years been considered binding upon the Supreme Court in dealing with efforts to induce the federal courts to interfere in State prosecutions except under the most unusual circumstances. My holding with respect to the quoted statute governing habeas corpus is buttressed by these time honored principles governing State-Federal relationships.

For those reasons an order will be entered denying the writ, but retaining jurisdiction of the case for any matters that might arise in it in the future.

Court of Appeals Opinion

Before TUTTLE, Chief Judge, and JONES and WISDOM, Circuit Judges.

The petitioner herein seeks an order, authorizing her to appeal from an order entered July 6, 1961, entered by the United States District Court for the Southern District of Mississippi, and moves for permission to proceed on her appeal upon the original papers filed in said District Court. Petitioner further moves for an immediate hearing of said appeal.

Petitioner asserts that she was arrested "for entering the white waiting room at the Continental Bus Terminal, Jackson, Mississippi, in the company of other interstate passengers of the Negro race, was sentenced on June 5, 1961, to two months imprisonment in the Hinds County jail, suspended, and a fine of $200 for violating Section 2087.5, Mississippi Code of 1942, as amended."

Petitioner asserts that because of the short term of her detention, and "the clear violation by respondent of the constitution and laws of the United States, the requirement that she must first exhaust her state remedies would, in effect, deny her the right of habeas corpus, in a situation where it was the sole effective remedy with which to safeguard her statutory and constitutional rights and liberties."

It no where appears in the petition that the petitioner has attempted to exhaust remedies available to her in the courts of the state of Mississippi, or that there is either an absence of available state remedies or that other circumstances exist which render such state remedies ineffective to protect the rights of the prisoner.

The jurisdiction of a federal court is fixed by the Acts of Congress. 28 U.S.C.A. §2254 provides as follows:

> "§2254. State custody; remedies in State Courts. An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

It not appearing from anything asserted in the petition in this case that petitioner sought to appeal her conviction, which she alleges to have been void and unconstitutional, or that she is financially unable to make bond pending such appeal, and it not appearing that petitioner

has no right to test her detention by habeas corpus in the state courts of Mississippi, there appears to be no sound reason for this Court to grant petitioner's motion for expediting the hearing in this Court. There thus appears to be no sound reason for granting petitioner's motion for permission to appeal upon the original papers, since no allegations are contained in the petition asserting petitioner's financial inability to cause the record to be prepared in accordance with the rules of this Court.

The motions are, therefore, DENIED.

Supreme Court Denial of Petition

This petition for habeas corpus is denied because the factual allegations fall far short of showing that there are not Mississippi state processes available by appeal or otherwise for Petitioner to challenge her state conviction, which processes would effectively protect her constitutional rights, particularly since any denial of such rights by the highest court of a State can be remedied by appropriate appellate proceedings in the Supreme Court of the United States. See 28 U. S. Code, Sections 2241, 2254 and 1257.

Mr. Justice Clark, who is the only other Justice available at this time for consideration of this motion concurs in this denial.

The petition is denied without prejudice to the right of its presentation to any other member of the Court.

S/ Hugo L. Black
Associate Justice

CRIMINAL LAW
Trespass—Louisiana

STATE of Louisiana v. Sidney Langston GOLDFINCH, Jr., et al.

Supreme Court of Louisiana, June 29, 1961, No. 45,491, 132 So.2d 860.

SUMMARY: Four sit-in participants, one white and three Negroes, were convicted in a Louisiana criminal district court of violating the state criminal mischief statute, enacted in 1960 [5 Race Rel. L. Rep. 880 (1960)]. Defendants had been arrested after refusing a store manager's request that they leave a lunch counter which was reserved for white customers. On appeal, defendants argued that the criminal mischief statute was unconstitutional in its application to their case in that the manager and the police were acting in concert to preserve a "custom of the state" and that this conduct constituted state action in violation of the Fourteenth Amendment. The Louisiana Supreme Court affirmed the conviction, holding that the statute itself is constitutional because it makes no reference to race, and that its application in the present case was constitutional because the manager's request and summoning of the police had been independent and "uninfluenced by any governmental action", to preserve a "business choice" of the individual proprietor.

SUMMERS, Justice.

The four defendants herein, a white and three Negroes, were jointly charged in a bill of information filed by the District Attorney of Orleans Parish with criminal mischief in that on September 17, 1960, they took possession of the lunch counter at McCrory's Store, and remained there after being ordered to leave by the manager in violation of the provisions of Title 14, Section 59 of the Revised Statutes of the State of Louisiana, the pertinent portions of which provide:

"Criminal mischief is the intentional performance of any of the following acts:

* * *

(6) Taking temporary possession of any

part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The defendants entered McCrory's store in New Orleans on the morning in question and took seats at one of the counters therein. McCrory's is part of a national chain operating in thirty-four states, owned by McCrory Stores, Incorporated. The New Orleans establishment is classified as a "variety merchandise" type store, made up of approximately twenty departments and open to the general public. Included in its services to the public are eating facilities composed of a main restaurant that seats 210, a counter for colored persons that seats 53, a refreshment bar that seats 24, and two stand-up counters.

The defendants were refused service at the counter where they were seated and which was reserved for whites, the manager was called, the counter was closed, and the defendants were requested to leave—in accordance with the policy of the store, fixed and determined by the manager in catering to the desires of his customers—or to seek service at a counter in the store providing service for Negroes. Upon their refusal, the police, who had been summoned by the manager, arrested them. They were subsequently tried and convicted of having violated the foregoing statute.

Defendants filed a motion to quash, motion for a new trial and a motion in arrest of judgment, all of which were overruled, and objected to the refusal of the Court to permit the introduction of certain evidence to which bills of exceptions were reserved.

These motions and bills of exceptions pertain primarily to the contention of defendants that the statute under which they were convicted, in its application against Negroes, is unconstitutional and discriminatory in that it denies to them the guarantees afforded by the Due Process and Equal Protection clauses of the Constitution of the United States and the Constitution of the State of Louisiana, particularly that afforded by the Fourteenth Amendment to the Constitution of the United States.

There should be no doubt, and none remains in our minds, about the applicability of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the state rather than private persons. The second sentence contains the phrases, "No State shall make or enforce any law * * *" and "nor shall any State deprive any person * * *; nor deny to any person * * *."

Since the decision in the Civil Rights Cases, 109 U.S. 3, 27 L.Ed. 835, 3 S.Ct. 18, it has been unequivocally understood that the Fourteenth Amendment covers state action and not individual action. Mr. Justice Bradley, speaking for the majority in these cases, stated:

> "The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States * * *."
>
> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."

The foregoing concrete language indicates emphatically that positive action by state officers and agencies is the contemplated prohibition of the amendment. 43 Cornell L.Q. 375. Mr. Justice Bradley further stated that the wrongful act of an individual is not state action "if not sanctioned in some way by the State, or not done under State authority, * * *." This proposition has been constantly reiterated by the highest court of our land. In Shelley v. Kraemer, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836, it was stated thusly: "Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

We are, therefore, called upon to determine whether the enactment of the questioned statute is such action by the State as is prohibited by the Fourteenth Amendment. In this connection it is recognized that the enactment of a statute which on its face provides for discrimination based upon race or color is a violation of the Fourteenth Amendment and constitutes state actions which that constitutional amendment prohibits.

A reading of the statute readily discloses that it makes no reference to any class, race or group and applies to all persons alike, regardless of race. It confers no more rights on members of the white race than are conferred on members of the Negro race, nor does it provide more privileges to members of the white race than to members of the Negro race. Williams v. Howard Johnson's Restaurant, 268 F.2d 845. The statute under consideration here stands no differently than does one imposing a penalty upon a person who enters without right the posted lands of another. It is not such a law as would be marked with the characteristic that it has been promulgated by our State for a special design against the race of persons to which defendants belong. To the contrary it is such a law that finds widespread acceptance throughout America. It is a legislative recognition of rights accorded to the owners of property similar to those found in almost all states of our nation. Mr. Justice Black in Martin v. City of Struthers, 319 U.S. 141, 87 L.Ed. 1313, 63 S.Ct. 862, referring to a statute of Virginia similar in scope to that here involved, said: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more."

Not being impressed with features which would mark it as discriminatory and *a fortiori* unconstitutional,[1] we conclude that the constitutionality of the statute must be presumed. State v. Winehill & Rosenthal, 147 La. 781, 86 So. 181, writ of error dismissed, 258 U.S. 605; Panama R.R. Co. v. Johnson, 264 U.S. 375, 68 L.Ed. 748, 44 S.Ct. 391; Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 72 L.Ed. 303, 48 S.Ct. 194; State v. Grosjean, 182 La. 298, 161 So. 871; State v. Saia, 212 La. 868, 33 So. 2d 665; Schwegmann Bros. v. La. Board of Alcoholic Beverage Control, 216 La. 148, 43 So. 2d 248; Olivedell Planting Co. v. Town of Lake Providence, 217 La. 621, 47 So. 2d 23; Jones v. State Board of Education, 219 La. 630, 53 So. 2d 792; State v. Rones, 223 La. 839, 67 So. 2d 99; State v. McCrory, 237 La. 747, 112 So. 2d 432; Michon v. La. State Board of Optometry Examiners, 121 So. 2d 565; 11 Am. Jur., Const. Law, Sec. 97.

Furthermore, courts will not hold a statute unconstitutional because the legislature had an unconstitutional intent in enacting the statute which has not been shown here. Doyle v. Continental Insurance Co., 94 U.S. 535, 24 L.Ed. 148; Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 93 L.Ed. 632, 69 S.Ct. 550; State v. County Comm., 224 Ala. 229, 139 So. 243, Morgan v. Edmondson, 238 Ala. 522, 192 So. 274. The courts will test a statute as it stands, without considering how it might be enforced. James v. Todd, 267 Ala. 495, 103 So. 2d 19, appeal dismissed, 358 U.S. 206; Clark v. State, 169 Miss. 369, 152 So. 820. Courts in considering constitutionality of legislation cannot search for motive. Shuttlesworth v. Birmingham Board of Education, 162 F.Supp. 372, affirmed, 358 U.S. 101.

Defendants further assert in their attack upon the statute that by content, reference and position of context it is designed to apply to, be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them. In aid of this assertion certain House bills of the Louisiana Legislature for 1960, introduced in the same session with the contested statute, were offered in evidence.[2] All of these bills did not become law, but some did.[3] It is declared that this law and the others enacted during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

But the primary contention here, conceding the constitutionality of the statute on its face, has for its basis that the statute is unconstitu-

1. Buchanan v. Warley, 245 U.S. 60, 62 L.Ed. 149, 38 S.Ct. 16; Flemming v. South Carolina Electric and Gas Co., 224 F.2d 752, appeal dismissed, 351 U.S. 901; Browder v. Gayle, 142 F.Supp. 707, affirmed, 352 U.S. 903; Evers v. Dwyer, 358 U.S. 202. 3 L.Ed. 2d 22, 79 S.Ct. 178; Dorsey v. State Athletic Comm., 168 F.Supp. 149, appeal dismissed and certiorari denied, 359 U.S. 533.

2. See Official Journal of the Proceedings of the House of Representatives of the State of Louisiana, 23rd Regular Session, 1960; House Bills 343 - 366, inclusive.

3. See Acts 68, 69, 70, 73, 76, 77, 78, 79, and 81, representing the only House Bills referred to in Footnote 1, which were enacted by the Legislature.

tional in its application and the manager and employees of the store were acting in concert with the municipal police officers who made the arrest, the district attorney in charging defendants, and the court in trying defendants' guilt; that these acts constitute such action as is contemplated by the prohibition of the Fourteenth Amendment. We have noted, however, that in order for state action to constitute an unconstitutional denial of equal protection to the defendants here that action must provide for discrimination of a nature that is intentional, purposeful, or systematic. Snowden v. Hughes, 321 U.S. 1, 88 L.Ed. 497, 64 S.Ct. 397; Charleston Federal Savings & Loan Assn. v. Alderson, 324 U.S. 182, 89 L.Ed. 857, 65 S. Ct. 624; City of Omaha v. Lewis & Smith Drug Co., 156 Neb. 650, 57 N.W. 2d 269; Zorack v. Clauson, 303 N.Y. 161, 100 N.E. 2d 463; State v. Anderson, 206 La. 986, 20 So. 2d 288; City of New Orleans v. Levy, 233 La. 844, 98 So. 2d 210; 12 Am. Jur., Constitutional Law, Sec. 566. Nor is a discriminatory purpose to be presumed. Tarrance v. Florida, 188 U.S. 519, 47 L.Ed. 572, 23 S.Ct. 402.

The defendants sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the State, its policy, or officers, and they would have this Court hold that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state. The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. In the past other Negroes who had mistakenly taken seats at the counter in question and who were told to move had cooperated and recognized the requests of the McCrory's employees and had sat at the counter set aside for them.

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The State, therefore, without the exercise of the proprietor's will can find no basis under the statute to prosecute.

These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the State. Furthermore, it is quite clear from the oral argument of defense counsel that this prosecution was sought after and provoked by the defendants themselves, and in reality the conviction they have sustained is the result of their own contrivance and mischief and is not attributable to state action.

The business practice which McCrory's had adopted was recognized then and is now recognized by us to be a practice based upon rights to which the law gives sanction. It has been expressed as follows:

"The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation * * * The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants." See State v. Clyburn, 247 N.C. 455, 101 S.E. 2d 295, and authorities therein cited. This right of the operator of a private enterprise is a well-recognized one as defendants concede. "The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic." Greenfield v. Maryland Jockey Club, 190 Md. 96, 57 A.2d 335.

The right to prevent a disturbance on one's private property and the right to summon law enforcement officers to enforce that right are rights which every proprietor of a business has whenever he refuses to deal with a customer for any reason, racial or otherwise, and the exercise of those rights does not render his action

state action or constitute a conspiracy between the proprietor and the peace officer which would result in state action. Slack v. Atlantic White Tower System, Inc., 181 F.Supp. 124, affirmed, 284 F.2d 746.

There is presently no anti-discrimination statute in Louisiana, nor is there any legislation compelling the segregation of the races in restaurants or places where food is served. There being no law of this State, statutory or decisional, requiring segregation of the races in restaurants or places where food is served, the contention that the action of the officials here is discriminatory is not well-founded for that action is not authorized by state law.

The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the State is one that supports segregation and hence state action is involved. This argument overlooks the facts that the segregation of the races prevailing in eating places in Louisiana is not required by any statute or decisional law of the State or other governmental body, but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires. Slack v. Atlantic White Tower System, Inc., supra.

To the same effect is the language of the court in William v. Howard Johnson's Restaurant, supra, viz.:

> "This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices.
>
> • • •
>
> "The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

The effect of the contentions of defendants is to urge us to disregard and ignore certain rights of owners and taxpayers in the enjoyment of their property, unaffected by any public interest, in order that they may impose upon the proprietor their own concept of the proper use of his property unsupported by any right under the law or Constitution to do so. We cannot forsake the rights of some citizens and establish rights for others not already granted by law to the prejudice of the former; this is a legislative function which it is not proper for this Court to usurp. Tamelleo v. New Hampshire Jockey Club, Inc., 102 N.H. 547, 163 A.2d 10. The fundamental propositions presented here are not novel; we treat them as settled and their change is beyond our province.

The conviction and sentence are affirmed.

CRIMINAL LAW
Unlawful Assembly—South Carolina

CITY OF DARLINGTON v. Arthur W. STANLEY, Jr.

Supreme Court of South Carolina, July 28, 1961, No. 4747, _____ So.2d _____.

SUMMARY: Individuals were convicted in a South Carolina municipal court of staging a parade on city streets without a permit required by a city ordinance, and the convictions were affirmed by the circuit court. Plaintiffs appealed, arguing that the ordinance was unconstitutional in that it deprived them of their right of freedom of speech, and in that it fixed no definite standard for the granting or denial of a permit. The convictions were affirmed by the South Carolina Supreme Court. The first contention was rejected on the reasoning that the ordinance was a reasonable regulation and necessary to allow cities to control the traffic on their streets, and that similar regulations had been upheld previously by the United States

Supreme Court. The second contention was also rejected, on the basis set out in the lower court's opinion: " 'Due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets and highways it clearly appears that it would be practically impossible to formulate in an ordinance a uniform plan or system relative to every conceivable parade or procession.' "

OXNER, Associate Justice.

Appellants were convicted in the Municipal Court of the City of Darlington of "staging a parade or procession on the streets" without a permit, in violation of the following ordinance:

"Whereas, the City Council of the City of Darlington deems it necessary for the preservation of the health, welfare and protection of the citizens of the City of Darlington, also for the preservation of the peace and dignity of said citizens, as well as to maintain law and order, to prohibit parades and processions within the corporate limits of the City of Darlington, without applicants desiring to stage said parades or processions having first applied for and secured a special permit from the City Council of the City of Darlington to use the public streets and sidewalks for said parades and processions as hereinafter provided.

"Now, therefore, be it ordered and ordained by the City Council of the City of Darlington in council assembled and by authority thereof:

"SECTION 1. That on and after the adoption and ratification of this Ordinance, it shall be unlawful for any person or persons, firms or organizations to stage any parade or procession on any of the streets or in any other public places within the corporate limits of the City of Darlington without first having applied for and secured a special permit from the City Council to do so, excepting funeral processions, the armed forces of the U.S. Army or Navy, the military forces of this State and the force of the police and fire departments of the City of Darlington.

"SECTION 2. Such application shall contain the following information: the time of such proposed parade or procession, the streets to be used, the number of persons or vehicles to be engaged and the purpose of such parade or procession; and, upon receipt of such application, the Mayor or City Council shall, in its discretion, issue such permit subject to the public convenience and public welfare."

(We have omitted Section 3, which fixes the penalty for violation of the ordinance, Section 4, which contains the usual clause repealing all ordinances inconsistent therewith, and Section 5, which fixes the date upon which the ordinance is to become effective. None of these sections has any bearing on the question before us).

Each of the appellants was sentenced to pay a fine of $55.00 or to imprisonment for a period of thirty days. Their conviction was sustained by the Circuit Court. This appeal followed.

Appellants admit that without making any attempt to obtain a permit, they engaged in a parade or procession in violation of the ordinance. We are, therefore, not called upon to determine whether the stipulated facts upon which the case was tried show a parade or procession within the meaning of the ordinance. The sole contention made in the Circuit Court and here is that the ordinance is unconstitutional in that (1) it fixes no standard or guide for the granting or denial of a permit and leaves the matter to the uncontrolled will of the City Council, and (2) it deprives appellants of their right of freedom of speech and assembly guaranteed by Section 4 of Article 1 of the Constitution of South Carolina and the right of freedom of speech and assembly guaranteed by the First Amendment to the Constitution of the United States, which is protected by the Due Process of the Fourteenth Amendment against invasion by state or municipal action.

As stated by Mr. Justice Jackson in Kunz v. People of the State of New York, 340 U.S. 290, 71 S.Ct. 312, 320, "cities throughout the country have adopted the permit requirement to control private activities on public streets and for other purposes." For a long number of years ordinances of this character have been in effect in most of the municipalities of South Carolina. Authority to enact same is given by Section 47-61 of the 1952 Code.

We shall first determine whether the ordi-

nance denies the constitutional guaranty of freedom of speech and assembly. Although these rights are fundamental, they are not in their nature absolute and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order. In Poulos v. State of New Hampshire, 345 U.S. 395, 73 S. Ct. 760, 30 A.L.R. (2d) 987, the Court said: "The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction. It is a nonsequitur to say that First Amendment rights may not be regulated because they hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom. This Court has never so held and indeed has definitely indicated the contrary. It has indicated approval of reasonable nondiscriminatory regulation by governmental authority that preserves peace, order and tranquility without deprivation of the First Amendment guarantees of free speech, press and the exercise of religion."

The right to engage in a parade is one phase of the exercise of the fundamental right of free speech. But such right is subject to reasonable and non-discriminatory regulation and limitation. 25 Am. Jur., Highways, Section 190; 16 C. J. S., Constitutional Law, Section 213, (8); 64 C. J. S., Municipal Corporations, Section 1769; Annotation 40 A. L. R., page 954. It is common knowledge that parades or assemblages may disrupt traffic, both pedestrian and vehicular, and destroy the primary purpose of the streets as a means of travel and transportation from place to place. Municipal authorities are charged with the duty of maintaining safety and order upon the streets for the comfort and convenience of the community. This problem was well analyzed by Chief Justice Hughes in Cox v. State of New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 133 A. L. R. 1396, in the following language:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection. * * * As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

In construing this ordinance, it will be presumed that the City Council of Darlington had in mind a constitutional rather than an unconstitutional purpose. Powell v. Thomas, 214 S. C. 376, 52 S. E. (2d) 782. It will not be declared unconstitutional if by any reasonable construction, it can be harmonized with the State and Federal Constitutions. Jones v. Prudential Insurance Co., 210 S. C. 264, 42 S. E. (2d) 331; Byrd v. Lawrimore, 212 S. C. 281, 47 S. E. (2d) 728.

We think it is obvious that this ordinance was not designed to suppress in any manner freedom of speech or assembly but to reasonably regulate the use of the streets in the public interest. It does not seek to control what may be said on the streets either by speech or by writing, and is applicable only to organized formations of persons using the streets and not to individuals or groups who are not engaged in a parade or procession. As stated in the preamble, the City Council deemed this enactment necessary "for the preservation of the health, welfare and protection of the citizens of the City of Darlington, also for the preservation of the peace and dignity of said citizens, as well as to maintain law and order." The requirement that the applicant for a permit state the time of the proposed parade, the course to be traveled, the number of persons or vehicles involved and the purpose of such parade

is to assist the municipal authorities in deciding whether or not the issuance of a permit is consistent with traffic conditions at any particular time and place. The fact that such detailed information is required to be presented to the City Council negatives appellants' claim that the power given to that body was to be exercised arbitrarily or for some capricious reason of its own. All of the information required to be furnished is related to the proper regulation of the use of the streets. Appellants argue that the purpose of the parade is wholly immaterial and the fact that this information is required indicates an intent to permit the municipality to act capriciously and arbitrarily. We do not think so. The decisions disclose that a number of ordinances and statutes contain such a requirement. It is not unreasonable. The purpose of the parade may have a bearing on the precautions which should be taken by the police authorities for the protection of those engaged in the parade and the general public.

It is argued that the ordinance applies not only to a parade or assemblage on the streets but to other public places. However, appellants cannot attack the ordinance in this respect for they are concerned only with its application to the use of the streets.

Nor do we find any merit in appellants' claim that the ordinance is invalid because it fixes no standard to be observed by the City Council in granting or withholding permits, thereby enabling that body to act arbitrarily and deny a permit to those having social, political or other views with which it might disagree. It is true that the general rule in this State, as elsewhere, is that a statute or ordinance which in effect reposes an absolute, unregulated, and undefined discretion in an administrative or public body will not be upheld. Henderson v. City of Greenwood, 172 S. C. 16, 172 S. E. 689; Schloss Poster Advertising Co. v, City of Rock Hill, 190 S. C. 92, S. E. (2d) 392; South Carolina State Highway Department v. Harbin, 226 S. C. 585, 86 S. E. (2d) 466. But as stated in the annotation in 92 A. L. R., at page 410, an exception or qualification to this rule is frequently made "where it is difficult or impracticable to lay down a definite comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare." Also, see 25 Am. Jur., page 552.

We think the foregoing exception applies here. We agree with the following statement found in the Circuit decree: "Due to varying traffic conditions and the complex problems presented in maintaining an orderly flow of traffic over the streets and highways it clearly appears that it would be practically impossible to formulate in an ordinance a uniform plan or system relative to every conceivable parade or procession." The standard to be applied is obvious from the purpose of the ordinance. It would be of little or no value to state that the standard by which the City Council should be guided is the safety, comfort and convenience of persons using the streets. That is already implicit in the ordinance, as we construe it. The members of the Council may not act as censors of what is to be said or displayed in any parade. If they should act arbitrarily, resort may be had to the courts. It is reasonable to assume from the stipulated facts in this case that the City Council of Darlington would have granted appellants a permit to engage in this parade if same had been sought. A denial would have been warranted only if after a required investigation it was found that the convenience of the public in the use of the streets at the time and place set out in the application would be unduly disturbed. As pointed out by Chief Justice Stone in Jones v. City of Opelika, 316 U. S. 584, 62 S. Ct. 1231, 1241: "When a licensing statute is on its face a lawful exercise of regulatory power, it will not be assumed that it will be unlawfully administered in advance of an actual denial of application for the license."

Appellants stress the use of the word "discretion" in Section 2 but we do not construe this as meaning an unfettered discretion but one to be exercised in connection with the safety, public order and convenience in the use of the streets. This construction is fortified by the phrase in Section 2 immediately following which states that the permit shall be issued "subject to the public convenience and public welfare."

The foregoing conclusion is fully sustained by State v. Cox, 91 N. H. 137, 16 A. (2d) 508. The Court there was called to pass upon the constitutionality of a statute requiring persons using the public streets for a parade or procession to procure a special license therefor from the local authorities. As does the ordinance before us, no standard or guide was laid down in the statute for granting or refusing a license. Defendants ignored the statute and engaged in a parade without the required license or permit.

They contended that the statute was invalid under the Fourteenth Amendment in that it deprived them of their rights of freedom of worship, freedom of speech and press, and freedom of assembly, vested unreasonable and unlimited arbitrary and discriminatory powers in the licensing authority, and was vague and indefinite. All of these contentions were overruled and the statute sustained. The Court pointed out that the application for a permit gave the public authorities notice in advance so as to afford opportunity for proper policing, and further observed that in fixing time and place, the license served "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." In answering the contention that the act was invalid as vesting in the local authorities uncontrolled discretion, the Court said:

> "The act is implicit in its requirement that the licensing authority act reasonably in granting or denying licenses, and with reference to the object of public order on the public ways. If it does not in express terms 'make comfort or convenience in the use of streets * * * the standard of official action' (Hague v. Committee for Industrial Organization, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423), the necessary inference is that it does, based upon the presumption in favor of the validity of legislation as reenforced by the express provision of the act bestowing 'delegated powers' upon the authority, as a grant intended to be only of due legislative power which may properly be delegated. The discretion thus vested in the authority is limited in its exercise by the bounds of reason, in uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination. A systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate. The licensing authority has no delegation of power in excess of that which the legislature granting the power has, and the legislature attempted to delegate no power it did not possess."

In an opinion by Chief Justice Hughes, the United States Supreme Court unanimously held that the statute, as construed by the Supreme Court of New Hampshire, violated no Federal constitutional rights of defendants. Cox v. New Hampshire, supra, 312 U. S. 569, 61 S. Ct. 762, 133 A. L. R. 1396.

An ordinance copied from the foregoing New Hampshire statute was sustained in State v. Derrickson and Poulos, 97 N. H. 91, 81 A. (2d) 312, which was affirmed by the United States Supreme Court. Poulos v. State of New Hampshire, supra, 345 U. S. 395, 73 S. Ct. 760, 30 A. L. R. (2d) 987.

We think the construction adopted by the Supreme Court of New Hampshire is sound. We place the same construction upon this ordinance.

We conclude that the ordinance does not violate either the Constitution of this State or that of the United States and should be sustained.

Affirmed.

TAYLOR, C. J. LEGGE and MOSS, JJ., concur, LEWIS, J., disqualified.

ELECTIONS

Registration—Federal Statutes

UNITED STATES OF AMERICA v. THE ASSOCIATION OF CITIZENS COUNCILS OF LOUISIANA, et al.

United States District Court, Western District, Louisiana, Shreveport Division, August 21, 1961, 196 F.Supp. 908.

SUMMARY: The United States brought action in a federal district court against individuals and organizations, charging deprivation of the voting rights of Bienville Parish, Louisiana,

Negroes. When the government filed a motion to preserve and produce registration records, a three-judge court was convened to hear defendants' attack on the constitutionality of the Civil Rights Act. The court ruled that no constitutional question was raised, because the motion to produce was filed under the Federal Rules of Civil Procedure and the action was a civil matter; and the court therefore dissolved itself. 5 Race Rel. L. Rep. 773 (1960). In the trial upon the merits before a one-judge court, it was found that discrimination was being practiced against Negroes in regard to registration for voting. The court found as facts that in 1956 the registrations of 95% of the Negroes registered to vote were challenged for errors in registration and that white voters registered with similar errors were not challenged; that contrary to state law, the Negroes were not allowed to use affidavits of other challenged voters to reinstate their registrations; and that the Negroes' names were then dropped from the registration rolls and a permanent registration was adopted for the parish. The court also found that the registrar had continued to discriminate against Negroes attempting to register down to the time of the trial. The names dropped from the registration rolls in 1956 were therefore ordered reinstated, and the registrar was enjoined from practicing racial discrimination in registering voters in the future.

DAWKINS, Chief Judge.

RULING ON MERITS

In clear, unmistakable terms, the 15th Amendment to the Constitution of the United States provides as follows:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Pursuant to the express authority of Section 2, Congress enacted the Civil Rights Acts of 1957 and 1960, 42 U. S. C. § 1971, *et seq.*, which empowers the Attorney General (§ 1971c) to bring an action for injunctive relief in Federal District Courts (§ 1971d) whenever any person or persons have engaged in any act or practice (§ 1971c) which deprives any other person, "...otherwise qualified to vote" (§ 1971a) of the right to vote secured by Section 1 of the 15th Amendment.

This action is brought by the Attorney General in the name of the United States against Mrs. Pauline A. Culpepper, Registrar of Voters for Bienville Parish, Louisiana (Registrar); the Association of Citizens Councils of Louisiana, Inc. (Association); the Citizens Council of Arcadia, Louisiana, Inc. (Arcadia Council); the Citizens Council of Gibsland, Lousiana, Inc. (Gibsland Council); and 17 individuals who are officers, directors or members of the Councils. It is alleged that, by their individual and concerted actions, the defendants have deprived and are depriving some 570 negro citizens of Bienville Parish, who formerly were registered voters there, of the right to register and vote in any elections held in the Parish. The prayer for relief is that all defendants be temporarily and permanently enjoined from any further action in that respect, and that the negroes whose registrations were cancelled in October, 1956, be ordered reinstated upon the voting rolls of the Parish. It is also prayed that a voting referee be appointed pursuant to § 1971(e).

Inasmuch as all of the individual defendants, except the Registrar, claimed the protection of the 5th Amendment against self-incrimination, and refused to testify, and because the Government's case was so thoroughly documented by the Registrar's own records, there is very little dispute as to the facts; indeed, there is *no* dispute except as to whether the Registrar continues to discriminate against negroes being permitted to register and vote, solely on account of their race or color.

Under the Constitution and laws of the State of Louisiana, registration for voting is a prerequisite to voting at any election by the people. Prior to January 1, 1957, registration for voting in Bienville Parish, Louisiana, was under the periodic registration system, whereby complete re-registration of all voters was required every four years.

Under Louisiana law (LSA-R.S. 18:132, 133, 244), any two registered voters may file affidavits with the Registrar challenging the registration status of any other voter; and the Registrar has the duty, if she has reason to be-

lieve that a voter is illegally registered, or has lost the right to remain on the rolls, to so notify the challenged voter by sending him a citation to appear at her office within 10 days and prove his right to remain on the rolls, by an affidavit executed by three other *bona fide* registered voters of the Parish. If the challenged voter fails satisfactorily to comply with the citation, his name is erased from the rolls.

Louisiana law further provides that an applicant for registration must be able to read, and give a reasonable interpretation of, any provision of the Constitution of Louisiana or of the United States (LSA-R.S. 18:35); and he must complete his registration form in his own handwriting, without assistance (LSA-R.S. 18:31). If the Registrar has reasonable grounds to believe that an applicant is not the person he represents himself to be, the Registrar may require him to produce two qualified registered voters of his precinct to identify him (LSA-R.S. 18:37).

In Bienville Parish there are approximately 6120 white persons and 4475 negroes of voting age. Immediately prior to October, 1956, there were approximately 5284 white persons and 595 negroes registered to vote in the Parish. In elections held prior to then, the negro voter had engaged in the reprehensible practice of "block voting," i. e., all or most of their votes were cast one way or another.

In September, 1956, it was planned that the permanent voter registration system would be instituted by the Bienville Parish governing body, the Police Jury, to become effective January 1, 1957. On September 24, 1956, a joint meeting of the Arcadia and Gibsland Councils was held at the American Legion Club in Arcadia, with Raymond Masling, the Association's Executive Director, being present to give advice. It then was decided unanimously to purge the voting rolls of the Parish of "illegally registered" voters, no mention of race or color being incorporated in the minutes of the meeting. It is clear, however, from the actions subsequently taken, that the plan was to purge most of the negroes—the "block voters"—from the rolls.

On the evenings of September 26, 27 and 28, 1956, the Registrar opened her office, after regular hours, to the individual defendants and assisted them in conducting the "purge". As the result of their efforts, the registrations of some 570 negroes were challenged, constituting approximately 95% of all negroes registered. Only 35 white registrations, being less than 1% of the total, were challenged, although an examination of the white registration cards in evidence discloses that about 80% contain the same, or similar, errors for which negro registrations were challenged. Of the white registrations actually challenged, approximately one-half of these persons had moved away from the Parish. All of this was well known to the Registrar, who actively participated in this concerted discrimination by the councils and individual defendants, on account of race or color of the negro registrants.

Within the ten-day period allowed by State law for answering the challenges, some 50 to 100 negroes went to the Registrar's office for the purpose of reinstating their registrations. Many were accompanied by one, two or three registered voters who also had received letters of challenge. The Registrar, contrary to State law, refused to allow any voter who had been challenged to execute an affidavit of retention for other challenged voters. Consequently, the names of all the 570 negroes whose registrations had been challenged were removed from the rolls.

The day after the purge was completed the Arcadia Council voted unanimously to urge adoption of a permanent registration system in Bienville Parish. In November, 1956, about one month later, the Police Jury adopted an ordinance to accomplish that purpose, effective January 1, 1957. In transferring to the permanent registration system, the Registrar placed the names of all persons who were registered voters on December 31, 1956, upon the permanent registration rolls. They were not required to reapply for registration, but simply had to sign, and return to her, their permanent certificates which she had sent to them.

As of December 31, 1956, there were 5282 white persons and 35 negroes registered to vote in Bienville Parish. As of October 8, 1960, there were 5184 white persons and 26 negroes on the permanent registration rolls.

While the Registrar, in her testimony, vehemently protested that she had never discriminated against negroes because of their race, the truth is that she has done so continuously, not only in the 1956 purge but even until the time this case was tried in November, 1960. Since 1956 she has registered 925 white persons and no negroes, although numerous members of the negro race have attempted to register. Of these 925 white persons, substantially more than one-

third executed application cards containing the same or similar errors as were on the cards of the negroes challenged. The Registrar has removed no names from the rolls since 1956, except for reasons of conviction of crime, death, and change of residence.

At the trial the Government presented a veritable parade of Bienville Parish negroes, holding bachelor's and master's degrees, who, since 1956, on one technicality or another, have been denied the right to register or re-register. An equally impressive group of white persons testified that they were permitted to register, although their application cards contained substantial errors, and their level of education was far below those of many of the negro applicants. It is perfectly clear from all the evidence that the Registrar arbitrarily has discriminated against negroes in identification requirements and has applied far more stringent qualification standards upon negro applicants than she has upon whites, solely because of race. This she has continued to do, and no doubt will do in the future unless judicially restrained.

While we deplore the negro practice of "block voting" with which all observant persons are familiar, not only in Bienville Parish, but in practically all parts of the country, still this factor cannot alter one whit our duty under the 15th Amendment to see to it, wherever we are called upon to do so, that there is no discrimination in voting registration because of race or color. It is to be earnestly hoped that in the future those negroes who are qualified to vote will achieve a degree of political maturity so as to vote according to the best interests of their State and Nation rather than for their own selfish or venal purposes.

The Supreme Court has held, in *United States* v. *Thomas*, (1960) 362 U.S. 58, 80 S.Ct. 612, 4 L.Ed.2d 535, affirming *United States* v. *McElveen*, 180 F.Supp. 10, that a pattern or practice of discrimination, such as described above, committed by all defendants, is action of the State of Louisiana, forbidden by the 15th Amendment and 42 U. S. C. § 1971(a). Therein the Court also held that proper judicial action in such a case is to order that the Registrar be enjoined from giving legal effect to the massively discriminatory challenges, and the Registrar be ordered to restore to the registration rolls the names of those thus illegally removed. As a lower federal court we have no choice but to follow that decision here.

Accordingly, a decree to that effect will be entered, except that those who have died, moved from the Parish, or become disqualified by conviction of crime, will not be included; and the Registrar, whose discrimination has continued through the years, also will be enjoined, (as well as her successors), against any future discrimination in conducting the affairs of that office.

As to the other defendants, since their part in this was accomplished nearly five years ago, and they will be advised by this ruling, we will deny for the present the application for an injunction against them, retaining jurisdiction, however, in the event they renew their unlawful activity. We find that appointment of a voting referee is not now necessary.

A proper decree should be presented on notice.

THUS DONE AND SIGNED, in Chambers, in Shreveport, Louisiana, on this the 21st day of August, 1961.

EMPLOYMENT

Fair Employment Laws—Colorado

CONTINENTAL AIR LINES, INC. v. COLORADO ANTI-DISCRIMINATION COMMISSION and its individual members, and Marlon D. GREEN.

District Court in and for the City and County of Denver, Colorado, January 7, 1961, Civil Action No. B-29648, _____P.2d_____.

SUMMARY: A Negro filed a complaint with the Colorado Anti-Discrimination Commission alleging that an airlines company had unlawfully discriminated against him by refusing to

employ him as a pilot because of his race. The commission found the company guilty of discriminatory and unfair employment practices under the Colorado Anti-Discrimination Act of 1957 [2 Race Rel. L. Rep. 697 (1957)], and ordered it to cease and desist from such practices and to give the complainant the first opportunity to enroll in its training school. On review by the district court of the city and county of Denver, the commission's order was held to be defective, having been signed only by the "coordinator." The commission thereupon attempted to withdraw its original findings and order and to substitute new ones therefor. This action was treated as a nullity by the district court, and the state supreme court affirmed, holding that the commission did not have the power to make such a substitution. 5 Race Rel. L. Rep. 778 (1960). The district court then heard the case on the merits of the original order. The court dismissed the case on the ground that the commission had no jurisdiction over interstate air carriers, because the federal government had preempted that field through the Civil Aeronautics Act and the Railway Labor Act.

FINDINGS OF FACT
CONCLUSIONS OF LAW
AND JUDGMENT

BLACK, District Judge.

This matter coming on for review of the proceedings and Order of the Colorado Anti-Discrimination Commission in the matter of Marlon D. Green, Complainant, vs. Continental Air Lines, Inc., Respondent, and the Court having reviewed the record, and having heard arguments of counsel, and having read the briefs of Mr. T. Raber Taylor, for Marlon D. Green, Complainant, Mr. Charles S. Thomas, for the Commission, and Messrs. Patrick M. Westfeldt, Mr. William C. McClearn, and Mr. Warren L. Tomlinson, of Holland & Hart, for Continental Air Lines, Inc.,

DOTH FIND:

That the Complainant, Marlon D. Green, filed a complaint against Continental Airlines, Inc., on August 13, 1957, alleging, in substance, as follows:

1. That Continental Airlines violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him as an airline pilot on or about July 8, 1957, because he is a Negro;
2. That Continental failed to notify him as to their acceptance or rejection of his application as an airplane pilot within 10 days, as promised; and
3. That Continental violated the Act because its forms contain at least two specifications prohibited by the Colorado Anti-Discrimination Act, vis.; attachment of photograph and requiring applicant to state his race.

The Commission, after a hearing, entered the following order:

"• • • • •

The Respondent (Continental) shall give to the Complainant (Green) the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957."

Continental Airlines appealed from the ruling on several grounds, which the Court will hereinafter review.

The Colorado Legislature, in 1937, enacted the following law:

"1953—C.S.A. 5-1-1: SHORT TITLE: This article is known and may be cited as "The Aeronautics Act of 1937."

"5-1-2. NAVIGATION OF AIRCRAFT: The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards now, or hereafter to be prescribed by the United States government with respect to navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States government then in force.

"5-1-3: LICENSE FOR NAVIGATION: The public safety requiring and the advantages of uniform regulations making it desirable in the interest of aeronautical progress that a person engaging within this state in navigating aircraft designated in section 5-1-2 in any form of navigation for which license to operate such aircraft would be required by the United States govern-

ment shall have the qualifications necessary for obtaining and holding the class of license required by the United States government. It shall be unlawful for any person to engage in operating such aircraft within this state in any form of navigation unless he have such a license.

"• • • • •

"5-1-8: INTERPRETATION: This article shall be so interpreted and construed as to effect its general purpose and to make uniform the law of those states which enact it and to harmonize as far as possible, with federal laws and regulations on the subject of aeronautics."

This Court must recognize that as early as 1937, the Colorado legislature recognized federal laws and regulations on the subject of aeronautics.

The Colorado Anti-Discrimination Act of 1957 provides:

"• • • • •

"(5) "Employer" shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; • • • • •"

It will be thus seen, from the above provision, that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce.

The evidence showed the Complainant, Green, received "an application blank" from Continental Airlines in San Francisco, at which time he was a citizen of Arkansas; he was interviewed in Denver; at the time he made a complaint, namely, August 13, 1957, he was a resident of the state of Michigan (folio 1), and he was not a licensed pilot under the federal law, nor under the Colorado Aeronautical Act, and did not become one until September 27, 1957 (folio 16), at which time he gave his residence as 734 South Smith Avenue, El Dorado, Arkansas.

It further appears that Green had filed complaints against United Airlines for unfair labor practices in the States of Washington, New York and the District of Columbia. In Michigan, he filed similar complaints against General Motors, Francis Aviation, and Abrams Aerial Survey Corporation. In Washington, D.C., Green filed similar complaints with the President's Committee on Government Contracts against Capital Airlines and the Air Division of General Motors.

This Court has not been advised of the disposition of these complaints; nor is it important that it has not been so advised.

Continental Airlines first and second claims for relief, which attack the jurisdiction of the Commission and raise a constitutional issue, are directed to the same basic legal issue and may properly be considered together. The facts upon which this issue is predicated were the subject of a Court-approved stipulation between the parties and are as follows:

Continental is a commercial carrier by air, operating pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. It provides air transportation for passengers, freight and United States mail between the states of Colorado, Texas, Oklahoma, New Mexico, Kansas, Missouri, Illinois and California. Continental was admittedly engaged in interstate commerce and it was further agreed that the position with Continental for which Respondent, Green, applied involved interstate operations. At the time of the hearing before the Commission, Continental employed approximately 220 pilots, of whom 90 to 95 were based in Denver. The other pilots were stationed in Texas. Notwithstanding these facts, the Commission asserted jurisdiction to hear and determine Respondent Green's complaint against Continental.

The constitutional issue presented in this case is not whether the State of Colorado had the general authority, pursuant to its police power, to enact the Colorado Anti-Discrimination Act. The question is whether the Act may legally be applied to the interstate operations of Continental involved in this proceeding.

Continental maintains that the Act, as applied to it on the facts of this case, is unconstitutional and void under the provisions of Article 1, Section 8, Clause 3, of the United States Constitution, which reads as follows:

"The Congress shall have power . . . (Clause 3) To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes; • • •"

Continental further contends that the United States Congress has preempted the field of law concerning racial discrimination in the inter-

state operations of carriers (both generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field.

The applicable rules of law on the constitutional issues are:

(a) In those areas of interstate commerce which by their nature require uniformity of regulation by a single authority, the states are without power to act even though Congress has not legislated on the subject; and

(b) In areas of interstate commerce which do not require such uniformity of regulation and in which the states may act because the matters are of peculiar local concern, whenever Congress does, by legislation, occupy the field, the states are thereafter without power to act.

In either (a) or (b) above, an attempt by a state to act is unconstitutional as a violation of the commerce clause of the United States Constitution and attempts of states agencies to apply such statutes are void and of no force and effect.

Congress has the power to regulate interstate commerce. *Article 1, Section 8, Clause 3, United States Constitution.* Early in the history of this country, the United States Supreme Court held that the power of Congress to regulate interstate commerce was supreme and plenary. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the Constitution." *Gibbons vs. Ogden, 9 Wheat. 1, 196, 6 L.Ed. 23, 70* (1824). This rule has never been altered and is today fully applicable.

The power of the Congress over interstate commerce does not mean that the States are completely without power to legislate in that field. In another early case, the United States Supreme Court held that in the absence of federal legislation regulating a particular area of commerce, the States could legislate on matters of peculiar local concern if the impact on interstate commerce did not interfere with the operation of that commerce. *Cooley vs. Port Wardens of Philadelphia, 12 How. 299, 13 L.Ed. 996* (1851). However, even when the Congress has not acted, States may not regulate matters which, because of their nature, require national uniform treatment. *Southern Pacific Co. vs. Arizona, 325 U.S. 761, 65 S.Ct. 1515* (1945).

These rules were expressed as follows by the United States Supreme Court in the *Minnesota Rate Cases, 230 U.S. 352, 33 S.Ct. 729* (1913):

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has been repeatedly declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

Although Congress has legislated extensively in the area of racial discrimination with reference to interstate air transportation and has thereby withdrawn this field from regulation by the several states, the Court will first consider whether racial discrimination by an interstate carrier is a subject which (a) must be free from diverse regulation by the several states and governed uniformly, if at all, by Congress, or (b) whether it is a matter of primarily local concern upon which the states can legislate until, but not after, Congress acts. The United States Supreme Court has clearly and directly ruled that this is a matter permitting only national action. Attempts by states either (a) to impose discrimination on account of race, or (b) prohibit such discrimination, have been held unconstitutional as applied to interstate carriers.

In *Hall vs. DeCuir, 95 U.S. 485, 24 L.Ed. 547* (1877), the court had before it a Louisiana statute which prohibited discrimination in passenger accommodations within the state. The defendant, owner of a passenger steamship which traveled the Mississippi River between Louisiana and Mississippi, had refused certain accommodations to a Negro and was sued by her. The Court concluded that the statute as applied to those engaged in the transportation of passengers among the States was unconstitutional. The Court said.

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instrumeents to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * *

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the River or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other side be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

The soundness of *Hall vs. DeCuir* was expressly reaffirmed by the United States Supreme Court in 1946. *Morgan vs. Virginia, 328 U.S. 373, 66 S.Ct. 1050* (1946). Here a Virginia statute required segregation of white and colored passengers for both intra-state and interstate motor vehicle carriers. A Negro passenger making an interstate trip challenged the validity of the statute as a burden on interstate commerce. The Court found that the statute, as applied to interstate carriers, was unconstitutional. The Court reaffirmed the doctrine of *Hall vs. DeCuir* in the following language:

"The factual situation set out in preceding paragraphs emphasizes the soundness of this court's early conclusion in *Hall vs. DeCuir,* 95 U.S. 485, 24 L.Ed. 547." 66 S.Ct. at 1057.

In conclusion, the Court said:

"It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid." 66 S.Ct. at 1058.

Mr. Justice Frankfurter, concurring in the Court's decision, stated:

"My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall vs. DeCuir,* 95 U.S. 485, 24 L.Ed. 547, is controlling. Since it was decided nearly 70 years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the court.

"The imposition upon national systems of transportation of a crazyquilt of State laws would operate to burden commerce unreasonably, whether such contradictory and confusing State laws concern racial comingling or racial segregation." 66 S.Ct. at 1059.

The rule first set forth in *Hall vs. DeCuir* and reaffirmed in *Morgan vs. Virginia,* namely, that state regulation of the racial policies of interstate carriers constitutes a burden on interstate commerce because this area demands a "single, uniform rule to promote and protect national travel" has been often approved and applied. For example, in *Chance vs. Lambeth,* 186 F.2d 879 (4th Cir. 1951), the Court held a regulation which required segregation of interstate passengers on a railroad to be unconstitutional because it imposed a burden on interstate commerce. The Court said:

"In *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, the court held that a statute of Louisiana which required a carrier to give all persons traveling within the state upon public vehicles equal rights and privileges was an unconstitutional regulation of interstate commerce since otherwise each state would be at liberty to regulate the conduct of carriers while in its jurisdiction, resulting in great confusion and inconvenience and destroying the uniformity necessary to the operation of the carrier's business." 186 F.2d at 881.

Also following the rule of *Hall vs. DeCuir* and *Morgan vs. Virginia* are *Charles vs. Norfolk & Western Railway Co.*, 188 F.2d 691 (7th Cir. 1951); *Whiteside vs. Southern Bus Lines, Inc.*, 177 F.2d 949 (6th Cir. 1949); *William vs. Carolina Coach Co.*, 111 F.Supp. 329 (E.D.Va. 1952) aff'd 207 F.2d 408 (4th Cir. 1953).

In *Pryce vs. Swedish-American Lines*, 30 F.Supp. 371 (S.D.N.Y. 1939), plaintiff brought an action for damages against defendant shipline, alleging that it discriminated against her because of her color in violation of the New York civil rights law "while she was a passenger on defendant's vessel on a cruise from New York City to various South American ports and return." Defendant was a Swedish corporation and the vessel involved was under Swedish registry.

As one of two grounds for dismissing plaintiff's complaint, the Court said:

"There is, however, an even more compelling reason for refusing to apply Sections 40 and 41 of New York Civil Rights Law to the facts set forth in the second cause of action. To do so, would in effect be contruing the statute as forbidding discrimination between passengers on the part of common carriers engaged in commerce between the port of New York and foreign ports. If construed in such a manner, the statute undoubtedly would illegally interfere with foreign commerce. See *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547." 30 F.Supp. at 372.

The *Pryce* case is a clear holding that to apply a state law forbidding racial discrimination to interstate or foreign commerce constitutes an unlawful interference with that commerce.

The important point is that the foregoing cases stand for the proposition that the question of racial discrimination by interstate carriers is, in and of itself, of such a nature that uniform regulation by a single authority is required. The burden on commerce lies in subjecting interstate carriers to the law-making powers of the legislatures in the several states through which such carriers move. The foregoing cases and others show the practical obstructions and burdens that result from such diversity of regulatory power. The diversity of this regulatory power is the burden on interstate commerce which is unconstitutional.

All of the states of the United States are sovereign within constitutional limits. What any particular state law is today or what it may be tomorrow, and whether or not any one or more of such states have any laws on the subject is of no significance. If an interstate carrier is subject to the regulatory power of all of the states through which it passes, it is automatically subject to non-uniform regulation. Such non-uniform regulation is what the United States Supreme Court has held to be barred by the commerce clause.

Respondent, Green, relies principally upon two cases, which the Court will discuss.

In *Bob-Lo Excursion Co. vs. Michigan*, 333 U.S. 28, 68 S.Ct. 358 (1948), a conviction under a Michigan civil rights statute was upheld. Defendant had refused to permit a Negro on its excursion boat which traveled between Detroit, Michigan, and Bois Blanc Island, a small island in the Detroit River about 15 miles from Detroit. Bois Blanc Island, which was almost entirely owned in fee by defendant and was used by it as an amusement park, was technically across the international boundary in Canada. However, there was no access to the island from Canada or in any way other than on defendant's excursion boat. The opinion does not indicate that defendant held a certificate of public convenience and necessity from any federal agency. Based upon these facts it was held that defendant's conviction under the Michigan statute did not violate the commerce clause in the United States Constitution. But the Court carefully limited its holding to the unusual facts before it, saying, in part:

"Of course, we must be watchful of state intrusion into intercourse between this country and one of its neighbors. But if any segment of foreign commerce can be said to have a special local interest, apart from the necessity of safe-

guarding the federal interest in such matters as immigration, customs and navigation, the transportation of appellant's patrons falls in that characterization. It would be hard to find a substantial business touching foreign soil of more highly local concern." 68 S.Ct. at 361-62.

In addition, the Court took pains to carefully distinguish the unique *Bob-Lo* situation from the doctrine established by the *Morgan* and *Hall* cases. It said:

"Appellant hardly suggests that the power of Congress over foreign commerce excludes all regulation by the states. But it verges on that view in regarding *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, supplemented by *Morgan vs. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317, 165 A.L.R. 574, and *Pryce vs. Swedish-American Lines*, D.C., 30 F.Supp. 371, as flatly controlling this case. We need only say that no one of those decisions is comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating effects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignties. None involved so completely and locally insulated a segment of foreign or interstate commerce. In none was the business affected merely an adjunct of a single locality or community as is the business here so largely. And in none was a complete exclusion from passage made. The Pryce case, of course, is not authority in this Court, and we express no opinion on the problem it presented. The regulation of traffic along the Mississippi River such as the Hall case comprehended and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here." 68 S.Ct. at 363-364.

It is thus quite clear that the U.S. Supreme Court did not intend to detract from nor diminish the doctrine of *Morgan* and *Hall*. It is equally apparent that the facts in the present case, involving frequent high speed air transportation between eight states pursuant to certification from the Civil Aeronautics Board, are much more akin to the transportation involved in *Morgan* and *Hall* than to the highly local, non-commercial traffic with which *Bob-Lo* was concerned.

During oral argument before this Court, Respondent, Green, indicated primary reliance upon *Railway Mail Association vs. Corsi*, 326 U.S. 88 65 S.Ct. 1483 (1945). The *Corsi* case did not in any way involve thee commerce clause of the U. S. Constitution. *Corsi* interpreted most favorably to Respondents, only held neither the due process clause of the 14th Amendment, nor the equal protection clause, nor the clause conferring authority over postal matters upon Congress prevented a state from adopting a civil rights statute. The application of such a statute to interstate commerce was neither raised nor discussed nor decided.

There is perhaps less permissible state regulation of interstate transportation than any other area of commerce. The characteristics of interstate transportation, namely, definite, regular and frequent contacts with numerous states, require that many aspects of interstate transportation be left free from state regulation. The speed and complexity of long-distance air transportation renders it even less susceptible to state regulation than the river boat travel involved in *Hall vs. DeCuir*, or the motor vehicle transportation in *Morgan vs. Virginia*.

The foregoing cases hold that the states may not regulate the racial policies of the interstate operations of carriers, and they are consistent with a body of law regulating interstate commerce which has been developed and uniformly applied for nearly 150 years.

In *Southern Pacific Co. vs. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945), the Supreme Court declared unconstitutional the Arizona Train Limit Law which precribed the maximum number of passenger and freight cars for trains operating in the state. The Court reiterated familiar rules when it said:

"But ever since *Gibbons vs. Ogden*, 9 Wheat. 1, 6 L.Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." 65 S.Ct. at 1519.

In holding the law unconstitutional, the Court said:

"Enforcement of the law of Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the train limit lowest restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state." 65 S.Ct. at 1522.

The Court clearly recognized that the Arizona law would of necessity affect operations in other states when it said:

"The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and before leaving the regulating state." 65 S.Ct. at 1523.

In *Southern Pacific Co. vs. Marie Jensen*, 244 U.S. 205, 37 S. Ct. 524 (1917), the Supreme Court held that New York Workmen's Compensation Laws could not be applied to stevedores working in the maritime industry. The Court drew a parallel between federal power over maritime matters and federal power over interstate transportation, referring to the latter in the following language:

"A similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it is now firmly established. Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." 37 S.Ct. 529.

Many state attempts to regulate interstate transportation operations have been struck down by the United States Supreme Court. A state statute requiring the use of a contour type of rear fender mudguard on interstate trucks conflicted with the commerce clause and was unconstitutional. *Bibb vs. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962 (1959). A state statute requiring interstate trains to greatly reduce their speed at grade crossings was found to be a burden on interstate commerce. *Seaboard Air Line Railway Co. vs. Blackwell*, 244 U.S. 310, 37 S.Ct. 640 (1917). A state was without constitutional power to order a railroad to remove bridges over which its interstate trains passed even though the bridge removal was a part of the State's flood control program. *Kansas City Southern Rwy. Co. vs. Kaw Valley Drainage District*, 233 U.S. 75, 34 S.Ct. 564 (1914). Burdensome intrastate stops by interstate trains cannot be demanded. *Herndon vs. Chicago, Rock Island & Pacific Rwy. Co.*, 218 U.S. 135, 30 S.Ct. 633 (1910); *St. Louis-San Francisco Rwy. Co. vs. Public Service Commission*, 261 U.S. 369, 43 S.Ct. 380 (1923). A state may not require that interstate trains leave their scheduled stops on time. *Missouri, K. & T. Railway Co. vs. Texas*, 245 U.S. 484, 38 S.Ct. 178 (1918). And a local ordinance regulating the maximum number of passengers per car and the minimum number of cars required for a street railway company operating between cities in two states was invalid. *South Covington and Cincinnati Street Railway Co. vs. Covington*, 235 U.S. 537, 35 S.Ct. 158 (1915). In this case, the Court said:

"If Covington (a city in Kentucky) can regulate these matters, then certainly Cincinnati (in Ohio) can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall vs. DeCuir*, 95 U.S. 485, 489, 24 L.Ed. 547, 548, 'commerce cannot flourish in the midst of such embarrassments.'" 35 S.Ct. at 161.

Thus, an unbroken line of United States Supreme Court cases over a period of nearly 150 years has established that the national power over interstate commerce is supreme and plenary; that even when Congress has not acted the states will not be permitted to regulate this

commerce in areas in which a uniform rule is needed because diversity of regulatory power creates an unconstitutional burden, that the racial policies pertaining to the interstate operations of carriers is an area in which a uniform rule is needed and only Congress can legislate, and that this, among many other aspects of interstate transportation, must remain free from regulation by the states.

Congress has regulated the activity involved in this case and thereby pre-empted the field, leaving the state without authority to act. The applicable rules concerning pre-emption are set forth in Kelly vs. State of Washington, 302 U.S. 1, 58 S.Ct. 87 (1937):

"The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government . . .

"This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where states may act in the absence of federal action but where there has been federal action governing the same subject." 58 S.Ct. at 91.

The Court stated that the doctrine of pre-emption is not applicable where there is a direct conflict between state law and federal law. In such a case the federal law is the supreme law of the land. In addition, the Court in the *Kelly* case pointed out that the pre-emption rule is inapplicable if the subject is one demanding uniformity of regulation.

By virtue of any one of several federal statutes and regulatory systems, an interstate air carrier is prohibited from racial discrimination. As to those employers, federal legislation pre-empts the field.

The Railway Labor Act prohibits racial discrimination. The Railway Labor Act (45 U.S.C.A. Sections 151, et seq.) hereinafter referred to as the R.L.A.), which was extended to cover interstate air carriers by a 1936 amendment (45 U.S.C.A., Sections 181, et seq.), is a comprehensive federal statute prescribing the duties of interstate air carriers with respect to their employees. There is no specific, detailed section of the R.L.A. which specifically treats the matter of racial discrimination. However, the United States Supreme Court has considered the provisions of the R.L.A. and has clearly held that racial discrimination by employers subject thereto is forbidden.

The latest pronouncement by the Supreme Court on this point came in *Conley vs. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). Petitioners were Negro railway employees who contended that the union had failed to represent them equally and in good faith and had failed to protect them from unjustified discharge and loss of seniority. The Court expressed its interpretation of the statute in clear terms in the opening words of its opinion:

"Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with *Steele vs. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination." 78 S.Ct. at 100.

The Court went on to say:

"Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad, and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act." 78 S.Ct. at 102.

In *Steele vs. Louisville & Nashville* RR., 323

U.S. 192, 65 S.Ct. 226 (1944), referred to above as the leading case in this field, the Court said:

"We think that the Railway Labor Act imposes upon the statutory representative of the craft at least as exacting a duty to protect equally the interests of the members of the craft as the constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. . . . We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of the craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

See also *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen*, 328 U.S. 210, 65 S.Ct. 235 (1944); *Graham vs. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 70 S.Ct. 14 (1949).

The scope of these holdings by the Supreme Court is made clear by *Brotherhood of Railroad Trainmen vs. Howard*, 343 U.S. 768, 72 S.Ct. 1022 (1952). Whereas in the *Steele* case the Negro petitioners had admittedly been members of the craft (locomotive firemen) but had not been members of the union (because membership was denied to them on account of race), in *Howard* "The colored employees had for many years been treated by the carriers and the Brotherhood as a separate class for representation purposes and have in fact been represented by another union of their own choosing." 72 S.Ct. at 1025. However, it was alleged that the Brotherhood, under a threat of strike action, forced the employer to enter into a collective bargaining agreement which would have the inevitable result of abolishing the Negroes' jobs and replacing them with Brotherhood members. By this action the union was in effect forcing the employer, an interstate rail carrier, to discriminate against Negro porters in the tenure of their employment. This is exactly the same field of law covered by the Colorado Act. The U.S. Supreme Court brushed aside the plea to restrict its earlier holdings to instances of discrimination by the union against members of the class it represented with the following language:

"Since the Brotherhood has dicriminated against 'train porters' instead of minority members of its own 'craft,' it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. We think this argument is unsound and that the opinion in the Steele case points to a breach of statutory duty by this Brotherhood.

"As previously noted, these train porters are threatened with the loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the Steele case 'discriminations based on race alone are obviously irrelevant and invidious.'" 72 S.Ct. at 1025.

And finally the Court held that the employer as well as the union was subject to the duty and obligation to treat its employees without discrimination based on race by permanently enjoining the railroad as well as the union from using the contract or any other device to oust the Negro porters from their jobs. This portion of the Court's opinion reads:

"On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs." 72 S.Ct. at 1026.

It is, of course, not material that the public policy or objectives behind both the federal and the Colorado legislation are similar. As stated by Mr. Justice Holmes, speaking for the Court in *Charleston & Western Carolina Ry vs. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915):

"When Congress has taken the particular subject matter in hand, coincidence (of state regulation) is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." 35 S.Ct. at 717.

See also *Wabash Railway Co. vs. Illinois*, 118 U.S. 557, 7 S.Ct. 4 (1886), where a state's attempt to prevent discriminatory railway rates was struck down because it was a subject of "general and national character," even though

federal regulation would not sanction discriminatory railway rates either.

In summary, the Supreme Court decisions over a number of years require nondiscriminatory representation by labor unions. In addition, the Supreme Court in the *Howard* case clearly held that the R.L.A. requires the same nondiscriminatory treatment by an interstate rail carrier employer with respect to its employees. Hence, the R.L.A., as interpreted by the United States Supreme Court, occupies the field of law relating to discrimination in matters of employment by interstate rail and air carriers.

Such pre-emption necessarily precludes any attempt by Colorado, as in the instant case, to extend its regulatory activities in the field to the interstate operations of an air carrier.

The Civil Aeronautics Act prohibits racial discrimination. Not only has the field of racial discrimination by interstate air carriers been pre-empted by the R.L.A., but it is also covered by the Civil Aeronautics Act, hereinafter referred to as the C.A.A., 49 U.S.C.A. Sections 401, et seq. It should be noted that in 1958, the C.A.A. was repealed and replaced with a new statute known as the Federal Aviation Program Act, hereinafter referred to as the F.A.P.A., 49 U.S.C.A. (Supp.) Sections 1301, et seq. However, the effective date of the F.A.P.A., insofar as it supersedes the earlier provisions of the C.A.A. applicable to this case, was not earlier than December 31, 1958. (See annotation following 49 U.S.C.A. (Supp.) Section 1301.) Respondent Green's complaint against Continental, which was filed with the Commission on or about August 13, 1957, referred to acts which allegedly occurred in June and July of 1957. As a consequence, the C.A.A. and not the F.A.P.A. was in effect during all times material to this action.

The Civil Aeronautics Act regulates practically every phase of an interstate air carrier's operations. The public policy of this act is set forth in the broadest terms. 49 U.S.C.A. Section 402. Extensive control is exercised over flight crew personnel. 49 U.S.C.A. Sections 551-560. Such employees are licensed or certified by the Civil Aeronautics Board, and that Board may under certain circumstances revoke or suspend certificates or licenses. The disciplinary power of the Board over flight crew personnel is very broad. For instance, the Civil Aeronautics Board has the power to suspend or revoke pilots' certificates for bad judgment even though the pilot violated no statute, rule or regulation. *Hard vs. CAB*, 248 F.2d 761 (7th Cir. 1957); *Wilson vs. CAB*, 244 F.2d 773 (D.C. App. 1957). The statute delegates extensive power to the Board, including the power to conduct investigations and issue orders, rules and regulations. 49 U.S.C.A. Section 425. Pursuant to that power, the Board regularly issues orders and has promulgated a large volume of rules and regulations touching practically all phases of interstate air carriage. 14 Code Fed. Regs.

The "intensive and exclusive" control of the Federal Government over air commerce was discussed by the United States Supreme Court in *Northwest Airlines, Inc. vs. Minnesota*, 322 U.S. 292, 64 S.Ct. 950 (1944). The following language from the concurring opinion of Mr. Justice Jackson is particularly illuminating:

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection in the hands of federally certificated personnel and under an intricate system of federal commands." 64 S.Ct. at 956.

In *Allegheny Airlines, Inc. vs. Village of Cedarhurst*, 132 F. Supp. 871 (E.D.N.Y. 1955), the Court had before it the specific contention that the federal statutes had pre-empted one aspect of air commerce. The Village of Cedarhurst, located near Idlewild Airport in New York, enacted an ordinance prohibiting air flights above the city at an altitude of less than 1,000 feet. In holding the Cedarhurst ordinance unconstitutional, the Court said:

"The plaintiffs' contention that the legislative action by the Congress together with the regulations, adopted pursuant thereto, have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute pre-emption in that field is upheld. The States, including the Village of Cedarhurst, are thus precluded from enacting valid contrary or conflicting legislation." 132 F. Supp. at 881.

In Fitzgerald vs. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956), the plaintiffs alleged that they were denied first-class passage on one of defendant's airplanes because of their race and that such conduct violated the Civil

Aeronautics Act, 49 U.S.C.A. Section 484(b), which provided in part as follows:

"No air carrier . . . shall . . . subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Court held that this section prohibited racial discrimination by interstate air carriers and that it created an actionable civil right for the vindication of which the person harmed could bring a federal court action. The Court said:

"Although we regard it as not controlling, we note also the following: *Congress sought uniformity in the practices of those subject to this Act.* It is by no means clear that, in all states and territories, the common-law rules would render unlawful racial differentiations in accord with the 'separate but equal doctrine,' whereas, in the light of recent Supreme Court decisions, we must construe Section 484(b) so that that doctrine will not apply." 229 F.2d at 502.

The language underlined in the last quoted portion of the *Fitzgerald* case shows that Congress considered uniformity in practices of interstate air carriers to be necessary. This is in effect both a legislative and judicial interpretation to the effect that uniform rather than diverse regulation is necessary.

The *Fitzgerald* case is also a clear holding that racial discrimination in interstate air commerce is prohibited by federal law. Although the case itself involved discrimination against a passenger, there can be no doubt that the same rule would apply to discrimination in matters of employment. The statute condemns "unjust discrimination" against "any . . . person" by an air carrier. "Person" certainly includes employees. Moreover, a subsequent case approved the broad interpretation which was given to section 484(b) by the Court in the Fitzgerald case. Judge Lumbard, concurring in *Spirt vs. Bechtel,* 232 F.2d 241 (2d Cir. 1956), made the following comments:

"The authorities cited by our dissenting colleague are not in point, it seems to me, because in those cases there was good reason to believe, and this court found, that Congress was enacting legislation for the benefit of a class. The court therefore concluded that the right of a member of the protected class to bring a civil suit should flow from the legislation. A clear case of this is our recent decision in Fitzgerald vs. Pan American World Airways, Inc., 229 F.2d 499. We were there concerned with 49 U.S.C.A. Sec. 484(b) which protects against unjust discrimination by air carriers. The plaintiffs were persons allegedly harmed by unjust discrimination and were clearly within a class which Congress sought to protect. 232 F.2d at 250.

In interpreting the Interstate Commerce Act, which contains language practically identical to the portion of the C.A.A. discussed in the *Fitzgerald* case, the U.S. Supreme Court, in *Mitchell vs. United States,* 313 U.S. 80, 61 S.Ct. 873 (1941), stated among other things, as follows:

"We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (Citations omitted). Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever,' 49 U.S.C. Section 3, 49 U.S.C.A. Section 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers." 61 S.Ct. at 877.

There are other reasons why it can only be concluded that the federal aeronautics statutes prohibit racial discrimination by interstate air carriers and therefore leave the states without authority to act in this field. The section setting forth the declaration of policy in the federal statute reads in material part as follows:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as

being in the public interest, and in accordance with the public convenience and necessity—

• • •

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;" 49 U.S.C.A. Section 402.

If anything, this section, which sets forth the objectives which Congress sought to achieve by the Act, is even more specific than the section held in the *Fitzgerald* case to prohibit racial discrimination.

In addition, as noted earlier herein, the original Civil Aeronautics Act was repealed and reenacted, with amendments, as the Federal Aviation Program Act. 49 U.S.C.A. (Supp.) Sections 1301, et seq. The section held in the *Fitzgerald* case to prohibit racial discrimination by interstate air carriers (49 U.S.C.A. Section 484(b)) was re-enacted without one word being changed. 49 U.S.C.A. (Supp.) Section 1374(b). It is a well-known rule that when a legislative body enacts without change a statute which has been judicially construed, the legislature is deemed to have approved and adopted the construction placed upon that act by the courts.

The *Fitzgerald* case is in accord with other decisions construing similar language in the federal statutes regulating other modes of interstate transportation. In *National Association for Advancement of Colored People vs. St. Louis-San Francisco Rwy. Co.*, ICC No. 31423, 1 Race Rel. Law Rep. 263 (1956), the Interstate Commerce Commission ruled that the statute under which it functions prohibited passenger segregation on interstate rail travel. The Commission said:

"The complainants invoke our authority to prevent violations of section 3 (1), which makes it unlawful for a rail carrier 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' The disadvantage to a traveler who is assigned accommodations or facilities so designated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable."

See also *Keys vs. Carolina Coach Co.*, ICC No. MC-C-1564, 1 Race Rel. Law Rep. 272 (1956), where the Commission ruled that racial discrimination in bus transportation was prohibited by the applicable federal statute. The statutory language involved in this case was exactly the same as that found in the C.A.A. and given the same construction in the *Fitzgerald* case.

The comprehensive scope of federal legislation with respect to interstate air carriers is obvious. When the pervasiveness of federal regulation of the industry generally is considered in connection with the specific federal laws and regulations (and the cases interpreting those laws and regulations) prohibiting racial discrimination by interstate air carriers, there can be no doubt but that federal law has covered the subject matter involved herein and leaves no room for the application of Colorado Law.

Executive orders prohibit discrimination by Government contractors. This is yet another federal regulatory system which covers racial discrimination by Petitioner and others similarly situated. By Executive Order 10479, August 13, 1953, the President established the Government Contracts Committee. The purpose of the committee is to prevent persons contracting with the federal government from discriminating on account of "race, creed, color or national origin." The committee recommended, and the President ordered in Executive Order 10557, September 3, 1954, that the following clause be included in all contracts executed by the contracting agencies of the federal government:

"In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause."

As a certificated commercial carrier by air, Petitioner is obligated to and in fact does transport United States mail under contract with the United States Government. 49 U.S.C.A. Section 485(a), 49 U.S.C.A. (Supp.) Section 1375.

Therefore, Continental remains constantly in the status of one contracting with the federal government and subject to the non-discrimination policy required of such contractors. Specifically, Continental is prohibited from discriminating against "any employee or applicant for employment" because of race "in connection with the performance of any work" under government contracts. Obviously, members of flight crews are engaged in the performance of work in connection with transporting the mail. Again, federal regulation occupies the field.

If federal law occupies a field, it does so exclusively and it is immaterial whether or not the federal power is exercised. Perhaps the outstanding example of this principle is *Guss vs. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598 (1957). The Court held in effect that where the matter of prevention of unfair labor practices affecting commerce had been occupied by the National Labor Relations Act, the occupation was exclusive and barred state action pursuant to state law, notwithstanding the fact that the NLRB had refused to act in the specific matter because of jurisdictional yardsticks established by it. The case is famous because the Court was fully aware of the so-called no man's land which existed where the federal government had jurisdiction but refused to act and the state government could not act. Nevertheless, Federal law "pre-empted" the field and the state was powerless to act.

To the same effect is *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959). The Court there held that state labor law could not enter fields which might arguably (though not definitely) be covered by the federal labor act. Several statements made by the Court indicate the breadth of the doctrine of pre-emption and the restrictions placed upon the extension of state law into areas covered by federal law:

"In the light of these principles, the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the State's jurisdiction is displaced.

* * *

"Even the States' salutary effort to redress private wrongs or grant compensation for past harms cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." 79 S.Ct. at 780.

These recent United States Supreme Court decisions delineate the scope of the pre-emption doctrine. The Railway Labor Act, the Civil Aeronautics Act and the Executive Orders pertaining to Government Contractors all deal directly and forcefully with racial discrimination by interstate air carriers. Hence, Colorado's racial policies may not be extended to this area.

In conclusion, the Court finds that the Colorado Act may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier.

Accordingly, the findings of the Colorado Anti-Discrimination Commission are set aside, and the Complaint of Marlon D. Green is dismissed.

The Court orders that a Motion for a New Trial be dispensed with, and if filed, would be overruled.

EMPLOYMENT
Labor Unions—Federal Statutes

J. D. CONLEY, et al. v. Pat J. GIBSON, et al.

United States District Court, Southern District, Texas, Houston Division, June 22, 1961, Civil Action No. 8443, _____F.Supp._____.

SUMMARY: Negro employees of railway companies in Texas, members of a union local composed solely of Negroes, brought an action in federal district court under the Railway Labor

Act against an "all white" local, its officials, and the parent Brotherhood of Railway Clerks. The employees sought a declaratory judgment and injunctive relief against required membership in a segregated local, and alleged discrimination based on race in the negotiation and administration of collective bargaining agreements, for which the "white" union was agent. The district court dismissed the action for lack of jurisdiction, finding that there was no allegation that the collective bargaining agent was improperly designated or that the agreements negotiated were illegal. 1 Race Rel. L. Rep. 556 (1955). The Court of Appeals for the Fifth Circuit affirmed in a per curiam order without opinion, citing cases which hold that primary jurisdiction of disputes under the Railway Labor Act is vested in the Railroad Adjustment Board. 229 F.2d 436 (1956). The Supreme Court reversed and remanded the case, holding that the Adjustment Board has no power under the Act to protect employees from discrimination, such as was here alleged, among unions or employees as distinguished from disputes between railroads and employee representatives. 2 Race Rel. L. Rep. 1093 (1957).

On remand, the district court again dismissed the action, holding that the plaintiffs had not shown any deprivation of any of their individual rights because there had been no injury to them personally, and therefore they could not maintain individual actions and had no standing to represent their class.

FISHER, District Judge.

MEMORANDUM OPINION

This case is again before the District Court but this time on Defendants' motion to dismiss as to the deceased Plaintiffs Moore and Carter, and to grant summary judgment as to the Plaintiffs Watson and Conley, and as to the purported class action.

A brief history of the case is necessary at this point. The complaint, filed August 21, 1954 by Messrs. J. D. Conley, Stanley Moore, Sr., George Carter and B. A. Watson against Pat Gibson, General Chairman of Locals 6051 and 28; Raymond Dickerson, Division Chairman of Locals 6051 and 28, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, A. F. of L., and Local 28 of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, seeks on behalf of themselves and others the named plaintiffs claim to represent declaratory, injunctive, and monetary relief for alleged violation of plaintiffs' rights under the Railway Labor Act because of their race and color.

A statement of the nature of the complaint, adequate for the present opinion, is set forth in *Conley* v. *Gibson*, 138 F. Supp. 60, the opinion by Judge Kennerly upholding the Defendant's motion to dismiss. On appeal to the United States Court of Appeals for the Fifth Circuit, the Court in a per curiam opinion affirmed the District Court in *Conley* v. *Gibson*, 229 F.2d 436. The Plaintiff's petition for certiorari to the Supreme Court was granted and on October 21, 1957, the Supreme Court in *Conley* v. *Gibson*, 355 U.S. 41, reversed the lower courts and held that it was error to dismiss the complaint for lack of jurisdiction and remanded the case to this court for further consistent proceedings.

On remand, the Court is again faced with a motion of Defendant which disposes of the Plaintiffs' claim. The three grounds of the motion are: (1) to dismiss the complaint under Rule 25(a) of the Federal Rules of Civil Procedure as to the deceased Plaintiffs Stanley Moore, Sr. and George Carter; (2) to grant summary judgment under Rule 56(b) of the Federal Rules against Plaintiffs J. D. Conley and B. A. Watson and the class action of those they claim to represent on the ground that the uncontroverted facts as shown in depositions on file with the Court, and the affidavit of Defendant Pat Gibson, show that Defendants have not violated any rights of Plaintiffs as alleged in the complaint; (3) and as an additional ground for judgment against Plaintiff Conley, the failure to appear, after notice, for the taking of his deposition.

Plaintiffs' response to the motion contains three paragraphs of which the first, dealing with damages, racial discrimination, and the relationship between the Texas and New Orleans Railroad Company and the Southern Pacific Transport Company, is immaterial to the disposition of this motion.

Paragraph II of Plaintiffs' response to the motion states, "No issue exists with respect to the facts contained in point (1) of Defendants'

Motion for Summary Judgment." This is quite correct, in that, Rule 25(a) states, "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. . . ." The exact dates of the deaths of Moore and Carter do not appear in the record; however, Plaintiffs' counsel advised Defendants of this fact at the time of taking B. A. Watson's deposition on December 4, 1958. See deposition of B. A. Watson, Page 3, December 4, 1958.

Under the mandate of *Anderson* v. *Yungkau*, 329 U.S. 482, this Court dismisses the complaint as to Plaintiffs Stanley Moore, Sr. and George Carter.

The sole question remaining is whether or not B. A. Watson and J. D. Conley have shown a deprivation of their individual rights. As to these remaining named Plaintiffs in this class action, Watson and Conley, it is well settled that they must be able to show injury to themselves individually or they have no standing to represent the class. As the Fifth Circuit held in *Brown v. Board of Trustees of LaGrange Independent School*, 187 F.2d 20,

> "All of these considerations, however, are completely beside the mark here, for plaintiff has wholly failed to plead or prove any deprivation *of his civil rights* and it is elementary that *he has no standing to sue for the deprivation of the civil rights of others.* What the Supreme Court said in *McCabe v. Atchison, T. and S.F. Ry. Co.*, 235 U.S. 151 at Pages 161-162 and 164, 35 S.Ct. 695 71, 59 L.Ed. 169, and quoted with approval in *State of Mo. ex rel. Gaines* vs. *Canada*, 305 U.S. 337, 351, 59 S.Ct. 232, 83 L.Ed. 208, has precise application here:
> '. . . The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. . . .'"

The deposition of B. A. Watson and the affidavit of Pat Gibson clearly illustrate that Watson and Conley have not been injured in any way by the actions of the Defendants. Even Plaintiffs' response to the motion admits that, "No issue exists with respect to so much of point (2) of Defendants' motion for summary judgment relating to J. D. Conley and B. A. Watson, individually; an issue does exist with respect to dismissal of said parties as representatives of the class." The following quotation from Watson's deposition sums up his position:

> "Q. You have already stated that you didn't lose any time?
> "A. I didn't lose any time.
> "Q. You didn't lost any pay?
> "A. I didn't lose any pay.
> "Q. You didn't lose any time or pay?
> "A. Well, I got the same pay until we got another raise.
> "Q. You didn't lose any seniority?
> "A. No, I didn't lose any seniority.
> "Q. So what you are complaining about is something that happened to somebody else; isn't that right?
> "A. Well, you can take it in that way, but I can consider that whatever happened to my fellow man, it happens to me as well."

As for the secondary claim that the Brotherhood maintains a segregated local 6051 contrary to law, Watson's deposition on this point reads,

> "Q. Have you ever filed any application with any lodge other than 6051?
> "A. Not in no labor organization, I haven't.
> "Q. That is all I am talking about.
> "A. No.
> "Q. You never did file any application or attempt to become a member of Lodge #28?
> "A. Lodge 28?
> "Q. Yes.
> "A. Not to my knowing.
> "Q. No. Your answer is No?
> "A. Yes, sir, that's right.

Again, it is clear that on the secondary claim, Watson has suffered no individual injury. The mere fact, if true, that a separate local is maintained solely for Negroes, does not give rise to an action for one who has not suffered injury because of that fact.

Watson has retired and is now receiving a pension from the Railroad.

Defendant Pat Gibson's affidavit stated that

Plaintiff Conley continued his employment with the Texas and New Orleans Railroad without loss of any pay or time. Conley walked off the job without permission in January of 1957, and was not heard of until October, 1957, when he returned to work. He failed to appear at a hearing set to investigate his actions and has not been heard of since. The affidavit was sworn to on April 14, 1961. Conley is no longer a member of the Brotherhood. It follows from the Gibson affidavit that Conley occupies the same status as Watson—both are uninjured Plaintiffs. An alternate ground for summary judgment as to Conley is his failure to appear for his deposition. Rule 37(d) states,

> "If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper services of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

Since there is no injured Plaintiff representing the class, the action must fail; therefore, the motion of Defendants to dismiss the complaint as to the deceased Plaintiffs Moore and Carter and to grant Defendants summary judgment as to Plaintiffs Watson and Conley, and as to the purported class action is hereby granted.

EMPLOYMENT
Picketing—Texas

Louis ORLANDO v. Eldrewey J. STEARNES, et al.

District Court of Harris County, Texas, July 18, 1961, No. 573,003.

SUMMARY: A Houston, Texas, business proprietor sought a temporary injunction in a Texas district court, against certain individuals and an association, to prohibit the picketing of his business. According to newspaper reports, the association initiated the picketing to force plaintiff to place Negroes in responsible supervisory jobs then held by white employees, the majority of plaintiff's employees being Negroes. The court granted the injunction, ruling that the picketing is illegal and that, if not enjoined, it would cause plaintiff to suffer irreparable injury and unascertainable damages, and that defendants' conduct, if continued, would probably result in breaches of the peace.

TRUNKS, J.

TEMPORARY INJUNCTION

On the 12th day of June, 1961 A.D., came on for consideration the application of Plaintiff, LOUIS ORLANDO, for a Temporary Injunction upon his verified petition, after due notice to Defendants, ELDREWEY J. STEARNES, BECKY PARR and PROGRESSIVE YOUTH ASSOCIATION, INC., as directed by the Court; and the Plaintiff and the Defendants having appeared in person and by their respective attorneys; and the Court having considered the Plaintiff's verified petition, the affidavits submitted by the parties, the evidence and argument of counsel; and it appearing that Plaintiff is entitled to the Temporary Injunction as herein granted, same being within his allegations and prayer, for the reasons that the picketing, as conducted by Defendants, is illegal, has diverted customers from Plaintiff's business and, unless enjoined, will continue to injure and depreciate Plaintiff's business; that the injury already sustained by Plaintiff and the threatened injury to Plaintiff are not capable of ascertainment to the full extent thereof, that Plaintiff has no adequate remedy at law for the prevention of such injury and is suffering, and will suffer, immediate and irreparable injury by Defendants'

acts and conduct, that such acts and conduct on the part of Defendants may, in all probability, result in general disorders, breaches of the peace, and cause strife and physical violence to erupt in the vicinity of the picket line.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Clerk of this Court issue a Writ of Injunction pending final hearing and determination of this cause, restraining and enjoining ELDREWEY J. STEARNS, BECKY PARR, PROGRESSIVE YOUTH ASSOCIATION, INC., their officers, agents, servants, employees and those persons in active concert or participation with them:

(a) From continuing, establishing, maintaining, or causing to be maintained, any manner of picket, or pickets, at or near or in the immediate vicinity of Plaintiff's premises and place of business located at 3317 Lyons Avenue, in the City of Houston, Harris County, Texas;

(b) From any character of interference with the use of the entrances into Plaintiff's premises by his employees or any members of the public who desire to enter same;

(c) From presenting themselves at or near Plaintiff's premises and place of business for the purpose of picketing or exhibiting signs, placards or banners, or in any manner interfering with Plaintiff's business;

(d) From the commission of any act that would interfere with, or cause either the employees or members of the public from entering and freely patronizing the Plaintiff's place of business;

(e) From the commission of any acts of violence or threats of bodily injury to the Plaintiff's employees or members of the public who desire to enter his premises;

(f) From the commission of any act or conduct seeking to destroy, impair or violate the inherent right of any and all of Plaintiff's employees to work for Plaintiff and to carry on their employment with him;

(g) From the commission of any act or the use of any means, the result of which would be to create a boycott against Plaintiff or a secondary boycott against persons who would otherwise carry on business intercourse with Plaintiff;

(h) From the commission of any act of interference of the free ingress to and egress from Plaintiff's premises by Plaintiff's employees who desire to work therein, or members of the public who desire to enter therein for the purpose of trading with Plaintiff;

(i) From the use of insulting, threatening and obscene language toward any of the Plaintiff's employees who desire to work for, or members of the public who desire to trade with Plaintiff, for the purpose of interfering with, hindering, obstructing and intimidating such employees and persons, and from interfering in any manner with such persons in the free exercise of their lawful rights;

PROVIDED, that Plaintiff shall, prior to the issuance of such Temporary Injunction, file with the Clerk a bond executed by him in the sum of ONE THOUSAND ($1,000.00) DOLLARS, payable to Defendants, with two or more good and sufficient sureties approved and conditioned as the law requires.

To which ruling of the Court, Defendants excepted and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District, sitting at Houston, Texas.

GOVERNMENTAL FACILITIES
Courtrooms—Virginia

George WELLS v. The Hon. Herbert B. GILLIAM.

United States District Court, Eastern District, Virginia, Richmond Division, June 1, 1961, Civil Action No. 3179, 196 F.Supp. 792.

SUMMARY: Negroes sought an injunction in a federal district court against continued racial segregation of the spectator seating area of the Petersburg, Virginia, municipal court. Plaintiffs also claimed both compensatory and punitive damages for "willful . . . and unlawful con-

duct of the defendant." The segregation had been directed by the presiding municipal judge, but neither the laws of the state nor the ordinances of the city required it. Plaintiffs argued that the federal courts had jurisdiction under 28 U.S.C.A. Sections 1331 and 1343(3), the latter being a provision of the Civil Rights Act. The district court dismissed the suit. It held that the claim for damages was not supported by any evidence and was instituted in bad faith; and therefore the court could have no jurisdiction under Section 1331, because the "amount in controversy" was insufficient. The court further held that it had no jurisdiction under Section 1343(3) in that no constitutional rights had been violated by the state court judge's action in the absence of state law requiring segregation in the court, because a judge must have control of his courtroom and the conduct of those attending it in order to preserve order therein and to see to it that justice is not obstructed by spectators.

LEWIS, District Judge.

MEMORANDUM OPINION

The plaintiffs, for themselves and all other members of the Negro race, via a suit for a declaratory judgment, seeks a permanent injunction restraining the Judge of the Municipal Court of the City of Petersburg, and all the servants, agents and co-workers from continuing racial segregation in the Municipal Court of the City of Petersburg.

Plaintiffs contend the practice is in violation of the Fourteenth Amendment of the Constitution of the United States and is therefore unconstitutional and unlawful. They also pray this Court to award each of them monetary damages in the amount of $130,000.04, in satisfaction of both compensatory and punitive damages for the alleged willful, deliberate, persistent, infuriating and unlawful conduct of the defendant.

Jurisdiction is invoked under Title 42, Sections 1981, 1983, Title 28, Sections 1331, 1334(3), 2201, 2281, 2294, U.S.C.A.

The case was heard upon stipulations of fact tendered in open court and made a part of the record, upon oral argument and consideration of written briefs submitted by counsel for all parties.

Simplified, the question presented is: Does this Court have jurisdiction under the Constitution of the United States or any section of the United States Code to enjoin and restrain a judge of a duly constituted court, created by the laws of Virginia, in the exercise of his duty to preserve order in his court and to see to it that justice is not obstructed by any person or persons; and if so, should the court exercise the same in an action of this type? We think not.

If jurisdiction exists in this Court, it rests under the Civil Rights Act, 28 U.S.C.A., 1343(3). It does not rest, as contended by the plaintiffs, under Title 28, Section 1331. The jurisdictional amount in controversy does not exceed $10,000.00, exclusive of interest and costs. The plaintiffs offer no evidence in support of their claim for monetary damages; in fact, their counsel stated judgment in the amount of one cent would be sufficient. Clearly, this phase of the litigation was instituted in bad faith.[1] Were it not for the fact the jurisdictional amount is of no importance in cases arising under the Civil Rights Act, this suit would be dismissed without further comment.

The evidence before this Court clearly establishes that the Municipal Court of the City of Petersburg was created and is being operated pursuant to the charter of the City of Petersburg and the laws of the State of Virginia; that the Honorable Herbert B. Gilliam was duly appointed and is now acting as the Judge of said Court by the Judge of the Hustings Court of the City of Petersburg; that in the space in the court room reserved for spectators and those awaiting the call of their business before the court, seating is assigned on the basis of racial designation, the seats on one side of the center aisle being for the use of Negro citizens and the seats on the other side being for the use of white citizens. The same number of seats are available for citizens of each race. There is no separation of the races in the area before the bench or the bar of the Court. Only persons having business before the Court are permitted in that area when the Court is in session. The separation of the races in that portion of the court room reserved for spectators has been a long established practice, directed and enforced by every judge occupying the bench of said court. The practice and custom has been con-

1. St. Paul Mercury Indemnity Co. v. Red Cab Company, 303 U.S., 283; Nixon v. Loyal Order of Moose, _____

tinued by the defendant, the present presiding judge, for the purpose of preventing frictions between the races and to preserve order and decorum in his court room and to assure the orderly administration of justice to all, regardless of race or color. The plaintiffs, who are Negro citizens of the United States and the State of Virginia, have on more than one occasion been ordered and required by the defendant Judge to occupy seats within the spectator section of the court room on a racially segregated basis while in attendance at the Municipal Court of the City of Petersburg. The same order and requirement has been enforced in the case of all other citizens, white and Negro alike.

The plaintiffs do not contend there is any discrimination by reason of color or otherwise in the administration of justice in that court; to the contrary, they admit there is no separation of the races either among the litigants, counsel or witnesses in the area before the bench or the bar of the court.

Upon the record thus made, no rights granted the plaintiffs under the Constitution of the United States have been violated. The Fourteenth Amendment to the Constitution, upon which the plaintiffs rely, does not grant any rights to the citizens of the United States. It provides only that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Counsel for the plaintiffs frankly concede neither the laws of the State of Virginia or the Ordinances of the City of Petersburg require the separation of the races in the spectator sections of the courts of Virginia. They assert, however, that many courts of record, including the Supreme Court of Appeals of Virginia, do not require segregated seating in their court rooms. Therefore, under the Equal Protection Clause of the Fourteenth Amendment, this Court should require the Municipal Court of the City of Petersburg to do likewise. If this Court had the power to so do, which it does not have, this Court would abstain from so doing. The Federal Courts have consistently held that the state courts are separate, distinct, judicial bodies. Abstinence, in state affairs, when not in conflict with the United States Constitution, has long been the federal policy. "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly-administered state concerns, a course so essential to the balanced working of our federal system." Harrison v. NAACP, 360 U.S., 167. "To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U.S. 521, 525, as their 'contribution * * in furthering the harmonious relation between state and federal authority * *' Railroad Comm'n v. Pullman Co., 312 U.S. 496."

Had not the precise question here presented been passed upon by a court of record in Virginia,[2] this Court would abstain from so doing until the question had been determined by the state courts.

Notwithstanding the Virginia adjudication of this matter, the plaintiffs contend there is no moral or legal justification requiring or condoning segregated seats in the Municipal Court of the City of Petersburg; that it is a mockery of justice and repugnant to the Due Process Clause and Equal Protection Clause of the Constitution of the United States; that it is degrading and shameful to permit such a custom. That these allegations are totally without merit is best evidenced by the fact the plaintiffs offered no evidence in support thereof. What rights, if any, the plaintiffs have as citizens of the United States in self-determining where they may sit in the Municipal court room of the City of Petersburg, have not been delineated with any degree of clarity. If they have the right to determine where they sit, they have the right to applaud, the right to take pictures, and many other similar rights; carried to the extreme, proper court room decorum and order would be non-existent. The evidence in this case establishes beyond question that the practice and custom complained of has been directed and enforced by every judge occupying the bench of that court; that the reason therefor is to preserve order and decorum and to assure the orderly administration of justice to all, regardless of race or color. There is no allegation or offer of proof that the order complained of is not being enforced equally among all citizens regardless of race or color.

2. Gladys M. Barrett, et al v. Carleton E. Jewett, Judge of the Police Court of the City of Richmond, Virginia (Hustings Court of the City of Richmond, Part II.) This case was not appealed to the Supreme Court of Appeals of Virginia.

Whether other courts of Virginia deem it necessary or unnecessary to promulgate a similar order is immaterial. Suffice it to say, it has recently been necessary for a Virginia court to clear the court room of all spectators in order to maintain decorum and order.[3]

That a judge has control of his court room and the conduct of those attending his court is axiomatic. Indeed, it is a power inherent in any court. In the administration of justice, the judge is charged with the preservation of order in his court and to see to it that justice is not obstructed by any person or persons whatever. Such is inherent in and incident to the exercise of the jurisdiction conferred upon him and is consonant with the power to punish for contempt committed in the presence of the court.[4]

It is well established that all courts have the inherent power to prescribe such roles of practice and rules to regulate their proceedings and facilitate the administration of justice as they deem necessary. The power to maintain order, to protect itself or its officers from being disturbed in the exercise of their functions, and the power to punish individuals who fail to comply with the rules adopted by the court to that end, are probably the most important of all inherent powers of a court, since such powers are essential to the very existence of a court as a judicial tribunal.[5]

3. Lynchburg.
4. See 14 Am. Jur., Courts, Sections 42 and 43, and cited authorities.
5. 14 Am. Jur., Courts, Sections 150, 151, 153, and 171, and cited authorities.

In addition to this inherent power, it is very clear under the laws of Virginia that judges of courts of record have control of the building in which their courts are maintained. This phase of the question was thoroughly discussed by Judge Hoffman in Dawley v. City of Norfolk, 159 F.Supp. 642.

Certainly, if judges of the courts of record in Virginia have control of the building in which their courts are maintained, they have control of the court room in which they preside. That the same control is vested in the courts of Virginia not of record is shown by sections of the Virginia Code. Section 16.1-25 gives such courts authority to make and enforce rules of practice; Section 16.1-26 grants the judges of the courts not of record the same powers as judges of courts of record to punish summarily for contempt.

For the reasons above stated, the Court is of the opinion that no rights of the plaintiffs or the class they represented, as granted or guaranteed to them by the United States Constitution, or any statutes of the United States, have been or are being violated and that this suit is without merit in fact or in law.

Counsel for the defendant will prepare an appropriate order, dismissing the suit, submit the same to counsel for the plaintiff for approval as to form, and it will be entered accordingly.

Costs are assessed upon the plaintiffs.

GOVERNMENTAL FACILITIES
Libraries—Tennessee

Jesse H. TURNER v. Wassell RANDOLPH, et al.

United States District Court, Western District, Tennessee, Western Division, July 22, 1961, Civil Action No. 3525, 195 F.Supp. 677.

SUMMARY: A Negro resident of Memphis, Tennessee, brought action in federal district court to desegregate the public libraries of that city. The city officials then voluntarily desegregated the library facilities [6 Race Rel. L. Rep. 1271 (1961)], but did not desegregate the restrooms therein, arguing that a city ordinance requiring racially separate toilet facilities prohibited such action if the ordinance were constitutional. The court held that the ordinance could not be constitutionally applied to public library buildings, because there are

no valid health or sanitation grounds for enforcing the regulation at those places as a reasonable use of the city's police power. It was observed that there was no showing either that venereal disease would be found to any appreciable extent among persons using the libraries or that such disease is contracted from the use of toilet facilities.

MILLER, District Judge.

MEMORANDUM

This action was brought by plaintiff, a negro resident of Memphis and Shelby County, Tennessee, to desegregate the public libraries of that city and county. As shown by order entered on January 4, 1961, the Mayor and Commissioners of the City of Memphis on October 13, 1960, after the action was instituted, publicly announced that in the future all public library units and facilities in the city of Memphis and Shelby County under the jurisdiction, management and control of the defendants, would be available to all qualified persons without discrimination on account of race and color. Because of such voluntary action on the part of the city, the order of January 4, 1961 directed that in the future all library units in the city and county shall be maintained and operated by the defendants without discrimination against qualified applicants solely on account of race and color. However, the question whether the defendants should be required to desegregate restrooms and toilet and lavatory facilities was expressly reserved, the defendants having insisted that a separation of these facilities was required in all buildings under a city ordinance by which they were bound, and that they accordingly should not be required to abolish the separation, or to remove the signs indicating such separate facilities for the races in the public libraries. The defendants had previously filed a motion to be permitted to amend their answer to plead the city ordinance as a defense, the motion specifically stating that the defendants had decided to stand on the ordinance and to submit the question of its constitutionality "to the Court for consideration in the light of existing conditions to be developed by the evidence presented to the Court." Such motion was allowed by the order of January 4, 1961, but the issue as to the constitutionality of the ordinance was reserved until a further hearing., Such hearing was held on May 3, 1961.

The ordinance is a part of this Memphis Building Code and its pertinent provisions are as follows:

"(d) Separate facilities required for white and black races and for both sexes.—where buildings are used by both white and the black races, separate facilities shall be provided for each race, and separate facilities shall be provided for both sexes of each race, where both men and women use any such building.

"(e) Proper signs be to affixed.—Proper signs shall be affixed on water closets indicating those provided for each race and for each of the sexes, in all buildings or places where such separate facilities are required." (Sec. 3044.29, Vol. II, Memphis Municipal Code).

When the Mayor and Commissioners of the City of Memphis announced a discontinuance of the policy of segregation in all "library units and facilities" in the city of Memphis and Shelby County, no specific mention was made of restrooms, lavatories or toilet facilities. Nor was any specific mention made of any other facilities. Since the facilities now in question are essential in the proper operation of the library units themselves, it is difficult to follow the argument that they were not in fact voluntarily desegregated by the city itself in announcing without qualification a discontinuance of its former policy of segregation.

However, as the defendants were proceeding on a voluntary basis in desegregating the public libraries, all doubts in this respect were resolved in their favor and they were permitted to plead as an additional defense the provisions of the ordinance quoted above, with the result that the only question now before the Court is whether the ordinance itself may be constitutionally applied to the library units and facilities under the jurisdiction and control of the defendants in the city of Memphis and in Shelby County.

Whether the ordinance in other situations or as applied to other types of buildings meets the constitutional test need not be decided. It is sufficient to dispose of the present case to determine whether it may be constitutionally applied to the particular buildings and facilities here involved.

The "separate but equal" doctrine which formerly met with judicial approval in sustaining

racial distinctions in connection with a great variety of publicly owned, maintained or operated facilities, has been generally swept away; in education, Brown v. Board of Education, 347 U.S. 483 (1954); in theatres, Muir v. Louisville Park Theatrical Assn., 202 F.2d 275 (6th Cir. 1953), vacated 347 U.S. 971; in housing, Banks v. Housing Authority of City & County of San Francisco, 120 Cal. App. 2d 1, 260 F.2d 668 (1953) cert. den. 347 U.S. 974; in parks, Dawson v. Mayor & City Council of Baltimore City, 220 F.2d 386 (4th Cir. 1955), aff'd 350 U.S. 877, Department of Conservation & Development v. Tate, 231 F.2d 615 (4th Cir. 1956); on golf courses, City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957), Holmes v. City of Atlanta, 350 U.S. 879 (1955) vacating 223 F.2d 93 (5th Cir. 1955); in swimming pools, City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956); in restaurants, Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956); and in many other areas.

In McLaurin v. Oklahoma State Regents, 339 U.S. 637, it was ruled that a state may not after having admitted a negro student to graduate instruction in its state university afford him different treatment from other students solely because of his race. In that case it appeared that the plaintiff was assigned to a seat in the classroom in a row specified for colored students; he was assigned to a separate table in the library on the same floor and also to a special table in the cafeteria. These separations, imposed by the state in order to comply with a state statute, were held to violate the plaintiff's constitutional rights under the equal protection clause of the Fourteenth Amendment.

Under the impact of McLaurin and the other cases cited, the conclusion appears inescapable that the separations here complained of may not be maintained in library units and buildings under the jurisdiction and control of the defendants in the city of Memphis and Shelby County, and that the city ordinance relied upon by the defendants, as applied to such buildings and facilities, is in contravention of the equal protection clause of the Fourteenth Amendment.

Dawley v. City of Norfolk, 159 F.Supp. 642, relied on by the defendants, in which the District Court dismissed an action by a negro attorney to require the city to remove signs denoting separate toilets for negroes in a state courthouse, and in which certiorari was denied by the Supreme Court, is inapposite. While some of the reasoning of the opinion is not altogether clear, the case is distinguishable upon the ground that the defendants named in the action did not have control over the courthouse and facilities, such control under Virginia statutes being vested exclusively in the state court judges who were not made parties. The Court in its opinion made the unqualified statement "that the action herein must be dismissed for the reason that the defendants do not have control of the courthouse."

In an apparent effort to support the ordinance as a reasonable and valid exercise of the police power, the defendants introduced proof at the hearing showing that the incidence of venereal disease is much higher among the negroes in Memphis and Shelby County than among members of the white race. The supplemental answer pleading the ordinance as an additional defense avers "that said ordinances are constitutional as a proper exercise of the police power of the city and that the public welfare requires the enforcement of said ordinances for reasons of health, sanitation and related factors to avoid the spread of contagious diseases...." One difficulty with this argument insofar as the present case is concerned, however the ordinance may be viewed with respect to other situations or other types of buildings, is that there is no showing that the application of the ordinance to buildings of the type now under consideration is necessary to protect the public health or to prevent the spread of contagious diseases. In fact, in the absence of proof, one would be led to believe that veneral disease would not be expected to occur to any appreciable extent among that segment of the population, whether white or negro, using the facilities and services afforded by the public libraries of the city. Another weakness in the defendants' position is that the Court would not be justified on the basis of the evidence presented to make a finding that venereal disease is communicated or contracted in the use of toilet facilities. It is true that the Secretary of the Venereal Disease Division of the County Health Department testified that it may be possible for venereal disease to be contracted in this manner, but she did not qualify as an expert in this respect and did not support her conclusion by relevant facts or statistics. The same witness testified that venereal disease is ordinarily communicated by physical contact between persons, and no scientific or reliable data have been offered to demonstrate that the joint use of toilet facilities by the races in the

libraries in Memphis and Shelby County would constitute a serious danger to the public health, safety or welfare.

An order will be submitted to the Court in accordance with this memorandum.

GOVERNMENTAL FACILITIES
Recreational Facilities—Tennessee

I. A. WATSON, Jr., et al. v. CITY OF MEMPHIS, et al.

United States District Court, Western District, Tennessee, Western Division, Civil Action No. 3957, _____F.Supp._____.

SUMMARY: Negro residents of Memphis, Tennessee, brought a class suit in a federal district court, seeking immediate desegregation of all facilities controlled by that city's Park Commission. The city had already integrated part of its park facilities and the Park Commission had evolved a program of gradual desegregation, including a plan to integrate further facilities in the near future. The court denied the prayer for declaratory judgment and an injunction, holding that defendants had shown that additional time was necessary to accomplish full desegregation, and that the Commission's plan for gradual desegregation does not deny plaintiffs' constitutional rights, but rather is in the public interest and made in good faith. In regard to one specific facility, the court refused to rule on the procedure for integration until the state courts first determine whether the city would lose its title to the property if desegregation were to be effected there.

BOYD, District Judge.

This cause came on for hearing upon complaint of plaintiffs and answer of defendants and the Court having heard and considered all of the evidence including depositions, oral testimony and exhibits thereto, and having considered the entire record in this action, finds the facts and states the conclusions of law as follows:

FINDING OF FACT

I

The Court has jurisdiction of this action under Title 28 U.S.C. Sections 1343 (c), 2201 and 2202, and Title 42 U.S.C. Sections 1981 and 1983.

II

Plaintiffs are Negro citizens of the State of Tennessee, who reside in the City of Memphis, and have brought this action on behalf of themselves and as members of a class of persons consisting of other Negro citizens of the City of Memphis.

III

The Memphis Park Commission is an agency or department of the City of Memphis, a municipal corporation of the State of Tennessee, and said Park Commission is composed of five (5) Commissioners duly appointed by the Mayor and Commissioners of the City of Memphis. Said Park Commissioners control the operation of the Memphis Park System with the management thereof being delegated to defendant, H. S. Lewis, Director of Parks.

IV

The City of Memphis has a population of approximately five hundred thousand (500,000) thirty-seven per cent (37%) of which are Negro, and sixty-three per cent (63%) are White (1960 Census). Memphis is located in the extreme southwest corner of Tennessee and is bounded on the west by Arkansas and the south by Mississippi. The population of the adjoining counties in Arkansas, Mississippi and West Tennessee is predominantly Negro.

V

There are one hundred and thirty-one (131) parks owned by the City of Memphis and operated by the Memphis Park Commission. These parks fall into four (4) categories:

(1) Twenty-three (23) are undeveloped; that is, raw land.

(2) Twenty-five (25) are used without restrictions by members of both races.

(3) Fifty-eight (58) are used by members of the White race only.

(4) Twenty-five (25) are used by members of the Colored race only.

VI

With very few exceptions the parks reserved for Negroes are in neighborhoods which are completely or predominantly Negro; and likewise, the parks reserved for White people are in neighborhoods which are completely or predominantly White. In the City of Memphis, the races are separated by neighborhoods and the Park Commission has consistently followed neighborhood patterns in providing recreational facilities for members of both races; and it has been its policy to remove restrictions applicable to Negroes as neighborhoods are converted, by voluntary action, from White to Negro, as early as practicable. At the present time, the Park Commission proposes in the near future to remove all restrictions as to use by Negroes in the following parks:-

(1) Desoto;
(2) Bellevue;
(3) Gaston Park with Community Center;
(4) Brinkley;
(5) Malone Park with swimming pool; and
(6) Riverside Playground.

VII

The following recreational facilities are operated by the Memphis Park Commission:-

(1) Boat dock and ramp at McKellar Lake, which is operated on an integrated basis.

(2) Ten (10) swimming pools—five (5) reserved for White use and five (5) for colored; and when Negroes are admitted to Malone Park with its swimming pool, these figures will be changed accordingly.

(3) Sixty-one (61) playgrounds on City owned property controlled by the Park Commission—forty (40) reserved for White use and twenty-one (21) for use by Negroes.

(4) Fifty-six (56) playgrounds and facilities operated by the Park Commission on property owned by churches, private groups and the School Board—thirty (30) of which are reserved for White use and twenty-six (26) for Negro.

(5) Twelve (12) community centers with gymnasiums on City owned property—eight (8) of which are reserved for White use and four (4) for Colored; and when restrictions are removed with references to Gaston Community Center, these figures will, accordingly, be changed.

(6) Seven (7) golf courses—five (5) reserved for White use and two (2) for Colored.

VIII

The recreational Department of the Memphis Park Commission is rated by competent authorities as the best in the South. Its recreational program for Negroes is the finest in the country. Approximately one hundred thousand (100,000) children participate in one or more of the recreational activities sponsored by the Memphis Park Commission—of this number approximately thirty-five thousand (35,000) are Negroes. The Recreational Department of the Park Commission sponsors many and varied types of recreational activities, including, but not limited to, competitive sports, such as baseball and basketball, dancing and many other activities. The Recreational Department headquarters itself is operated on an integrated basis, and all Negro Supervisors and Directors are paid on the same salary schedule as the White Supervisors and Directors; and the qualifications for such Negro Supervisors and Directors are equal to or greater than that of their White counterparts.

IX

Defendants have heretofore operated twenty-five (25) parks in the City on a nonsegrated basis; and have recently integrated Overton Park 200, Art Gallery in Overton Park, and the Park Commission facilities at McKellar Lake. In furtherance of its gradual program of integration, the Park Commission has evolved the following plan and the following facilities will be open to all races, without restrictions, at the dates indicated:-

(1) The Fairgrounds Amusement Park at the conclusion of the present year.

(2) Pine Hill Golf Course, January 1, 1962.
(3) Fuller Golf Course, February 1, 1962.
(4) Riverside Golf Course, March 1, 1962.
(5) Audubon Golf Course, January 1, 1963.
(6) Douglass Golf Course, February 1, 1963.
(7) Overton Park Golf Course, March 1, 1963.
(8) Galloway Golf Course, January 1, 1964.

X

Defendants have acted and are acting in good faith in recognizing the constitutional rights of the Negro citizens of Memphis to make use of facilities under Park Commission control on a nonsegrated basis.

XI

In considering the question of good faith of defendants in recognizing the constitutional rights of plaintiffs and other Negro citizens, as well as the plan and program evolved by defendants to desegregate the Memphis Park System, the Court has given consideration to the following:-

(1) Importance of time to accomplish change-over from a partially segregated system to an integrated one.

(2) Good will and understanding heretofore obtaining between the races.

(3) The fact that, pending the transition period now in progress, ample recreational facilities under the operation of the Park Commission, will be available to all Negro citizens of Memphis, and no Negro will be denied the right to avail himself of those facilities.

(4) Maintenance of law and order.

(5) Avoidance of confusion and turmoil in the community.

(6) Revenues available from concessions operated on park property.

(7) The fact that immediate integration would result in a denial to a substantial number of citizens, both Negro and White, of an opportunity to avail themselves of recreational facilities now afforded to all citizens of Memphis.

(8) The constitutional and other legal rights of all citizens, both White and Colored.

XII

Immediate forced integration of all facilities of the Park Commission would be unwise under all the circumstances as presented by the proof. The plans and programs evolved by the Park Commission properly take into account the constitutional rights of Negro citizens without overlooking many other factors, as hereinabove set out.

XIII

The plan of defendants for integrating Fairgrounds Amusement Park and all of the public golf courses is reasonable, fair and equitable and should be approved.

XIV

If the property on which John Rogers Tennis Courts are located is not sold or abandoned for use as tennis courts, consideration should be given by defendants to removal of all racial restrictions on these tennis courts by January 1, 1962.

XV

Integration of playgrounds and community centers operated by defendants is a matter in the interest of all citizens of Memphis, both White and Colored, and calls for more study. No specific terminal date for such integration can be set at this time. Defendants should file plan for integration of such facilities within six (6) months from June 15, 1961, and at that time, such plan can be given proper consideration by the Court.

XVI

The City of Memphis acquired Pink Palace Museum and property on which it is located by deed dated August 2, 1926 from Garden Communities Corporation. This deed provided "said building and grounds shall be devoted wholly and exclusively to public uses for the benefit of persons of the Caucasian race only and as a conservatory, art gallery, museum of art or natural history, library and/or for general recreational purposes in connection with the Memphis Park System, including parks adjacent thereto * * *." Said deed also reserved unto the grantor, or its assigns, after notice as provided in the deed, the right to re-enter and hold the same as of its former estate in the event of breach of the above condition.

XVII

Negro citizens of Memphis have been permitted to make use of the facilities of Pink Palace Museum on one day per week and this use has been permitted without any apparent com-

plaint on the part of said grantor, or its assigns; however, said deed in providing for forfeiture contains the following additional language: "A waiver for any period of time of a breach of either or any of the foregoing convenants and conditions shall not preclude a forfeiture for a continuance thereof after notice as above specified."

XVIII

The "Advisory Board Memphis Museum" recommended to the Memphis Park Commission on January 6, 1959 that the Museum property be sold for residential purposes and that a new Museum be build on other City property. In response to this request, J. S. Allen, Esquire, the then Park Commission Attorney, submitted comprehensive report and summary of titles to the property involved and stated in his report dated February 5, 1959 "that neither the City nor the Park Commission could safely sell or cease the use for museum or park purposes as to any of the respective properties conveyed by these deeds."

Said report and opinion was made before the present lawsuit was filed.

XIX

Defendants have evinced a willingness to remove all race restrictions obtaining at Pink Palace Museum, except for the fact that they feel a removal of all restrictions might result in a loss of this valuable property to the City and the Park Commission.

XX

Defendants' present policy with reference to Pink Palace Museum is not based upon any effort to deny Negro citizens of Memphis the right to use of this facility, but rather is based upon a policy of attempting to preserve title to the property.

CONCLUSIONS OF LAW

I

Compulsory segregation on the basis of race in the public schools violates the provisions of the Fourteenth Amendment to the Federal Constitution.

Brown vs. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 683, 98 L.Ed. 873.

II

The rule in the *Brown Case* has been extended to the field of public parks and recreational facilities.

Dawson vs. Mayor and City Council of Baltimore City, 220 Fed.2d 386, (U.S.C.A. Fourth, 1955); affirmed 350 U.S. 877, 100 L.Ed. 774;

City of St. Petersburg vs. Alsup, 238 Fed.2d 830 (U.S.C.A. Fifth Circuit, 1956).

III

Full implementation of the constitutional principles as announced in the *Brown Case* requires solution of varied local problems. Local authorities, and in this case the responsible Park Commission officials, have the primary responsibility of elucidating, assessing and solving these problems. The District Courts have the obligation of determining whether the action of local authorities constitutes good faith implementation of the governing constitutional principles; and in fashioning and effectuating decrees, the Court is guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.

Brown vs. Board of Education of Topeka, 349 U.S. 294, 99 L.Ed. 1083 (Second decision decided May 31, 1955).

IV

Delay in desegregation of public parks and recreational facilities does not amount to a denial of the constitutional rights of Negro citizens where a good faith attempt is being made by local officials to abolish segregation on a gradual basis.

Kelley vs. Board of Education of City of Nashville, 270 Fed.2d 209 (U.S.C.A. Sixth Circuit, 1959);

Aaron vs. Cooper, 243 Fed.2d 361 (U.S.C.A. Eighth, 1957).

V

In determining whether defendants are acting in good faith in recognizing the constitutional rights of Negro citizens to make use of the Park Commission facilities on a nonsegregated basis, it is proper for the Court to consider (1) local

conditions and local problems as to facilities, and teacher or supervisory personnel, as well as local problems of maintaining, during the transition period, maximum recreational facilities for all citizens, White and Negro; (2) importance of time to accomplish change-over from a partially segregated system to an integrated one; (3) good will and understanding heretofore obtaining between the races and (4) avoidance of confusion and turmoil and maintenance of law and order in the community during the transition period.

Brown vs. Board of Education, supra; Aaron vs. Cooper, supra; Kelley vs. Board of Education of City of Nashville, supra.

VI

Injunctive relief to require immediate desegregation of all facilities of the Park Commission should not be granted where defendants have acted in good faith and need additional time to accomplish complete desegregation of Park Commission facilities.

Aaron vs. Cooper, supra; Kelley vs. Board of Education of City of Nashville, supra.

VII

"Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms."

Cooper vs. Aaron, 358 U.S. 20, 3 L.Ed. 2d 19, 78 S.Ct. 401 (concurring opinion of Mr. Justice Frankfurter' at 3 L.Ed. 2d 22);

Kelley vs. Board of Education of City of Nashville, supra.

VIII

The burden rests upon defendants to establish that additional time is necessary, in the public interest, and is consistent with good faith compliance of the governing constitutional principles at the earliest practicable date.

Brown vs. Board of Education of Topeka (Second decision), supra;

Kelley vs. Board of Education of City of Nashville, supra.

IX

During the transition period from partial segregation to complete desegregation, the District Court should retain jurisdiction.

Brown vs. Board of Education of Topeka (Second decision), supra;

Kelley vs. Board of Education of City of Nashville, supra;

Aaron vs. Cooper, supra.

X

Under Tennessee law, if the condition respecting race in the Pink Palace Museum deed is breached, there is a possibility that the City of Memphis might lose title to this valuable property. The determination of the legal effect of the conditions in said deed is complex and difficult to determine without an adjudication by a Court of competent jurisdiction.

Yarborough vs. Yarborough, 151 Tenn, 221, 269 S.W. 36.

XI

The Chancery Court of Shelby County, Tennessee has jurisdiction to determine the legal effect of said conditions in the Pink Palace Museum deed; and if the State courts should determine that the City's title would not be affected by desegregation of said Museum, there would be no question remaining for decision by this Court. Consequently, this is a proper case for application of the doctrine of abstention under which adjudication in this Court of all matters with reference to Pink Palace Museum may be stayed pending determination by the State courts of the legal effect of said conditions in the Pink Palace Museum deed relating to race.

Harrison vs. NAACP, 360 U.S. 167 3 L.Ed. 2d 1153, 79 S.Ct. 1025;

Louisiana Power & Light Co. vs. Thibodaux, 306 U.S. 25, 3 L.Ed. 2d 1058, 79 S.Ct. 1070.

Annotation "Discretion of Federal court to remit relevant state issues to state court in which no action is pending," 3 L.Ed. 2d 1827.

CONCLUSIONS OF FACT AND LAW

Defendants have shown by a preponderance of the evidence that additional time is necessary to accomplish full desegregation of all facilities operated by the Memphis Park Commission, and defendants have further shown that their plan and program for gradual desegregation is necessary, in the public interest, and is consistent

with good faith implementation of the governing constitutional principles as announced in *Brown vs. Board of Education, supra,* taking into account all of the local conditions and problems hereinabove set out; and the Court has concluded, in the exercise of its discretion, that the prayer for declaratory judgment and injunctive relief should be denied.

HOUSING
Anti-Discrimination Statutes—California

Eugene M. SWANN, et al. v. Eugene H. BURKETT, et al.

Municipal Court, Berkeley-Albany Judicial District, Alameda County, California, April 28, 1961, No. 12243.

SUMMARY: Individuals brought action in a California municipal court against owners of residential property, seeking relief under a state statute against discrimination in their attempt to rent the property. The court granted defendant's motion for a non-suit, holding that the statute providing for "equal accommodations . . . in all business establishments" was not intended by the legislature to cover rental housing managed by the owners where no services were provided other than the use of the property.

STAATS, Judge.

MEMORANDUM

At the conclusion of the plaintiffs' case the defendants moved for a non-suit on the grounds that:

1) There was no evidence which could sustain a finding of discrimination based on color or race; and

2) That Section 51 of the Civil Code has no application to the facts or circumstances of this case.

The court at that time ruled that there was sufficient evidence to support a finding that defendants discriminated against the plaintiffs in refusing to rent the apartment to plaintiffs but stated it needed some time to study the arguments of counsel and research the law in regard to the interpretation of Section 51 of the Civil Code.

The facts in so far as they are applicable to this discussion are as follows:

The defendants own, in addition to their own home in Orinda, two pieces of property in Berkeley—one consisting of a triplex and a rear garden cottage at 2709 Benvenue, and the other consisting of two units and a rear garden cottage at 2717 Hillegass. Both of these properties consist of living units and are commonly known as income property. The defendants employ no persons to assist them in the rental or maintenance of these properties, and maintain no office.

The applicable portion of CC 51 read as follows prior to 1959:

> "All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens."

In 1959 the section was amended to read as follows:

> "All citizens within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facil-

> ities, privileges, or services in all business establishments of every kind whatsoever.

The question to be determined in this case seems to resolve around whether the 1959 amendment gives any broader meaning to the word "accommodations" and what is the meaning of the words "business establishments." There seem to be no authorities in point except our legal and standard dictionaries.

The dictionaries contain many definitions of the word "accommodations." All agree, however, that "accommodations" means help, aid, or convenience. Its popular use to denote living quarters or eating quarters is used in the sense that "we can accommodate you and your family," or, "we have a number of accommodations available this evening." Thus, some of the dictionaries list one of the word's meanings as "lodgings" and "transportation facilities." In this sense this meaning seems to be limited to instances where the guest or the customer is of a temporary or non-residential nature such as in a hotel or restaurant. It does not seem to include those types of living quarters which are to be used as an indefinite or permanent abode where one might establish his residence. It may, however, be given a broader meaning in this instance by stating that people are entitled to the "full and equal accommodations . . . in all business establishments. . . ."

The authorities again seem to be of little help in defining "business establishments." Even the dictionaries are of not much help. Plaintiffs contend that the words include any activity in which one engages for economic profit. On the other hand it is argued that people look upon a business establishment as something that is selling services or rentals as distinguished from one who is merely receiving rental for the use of his property. It is questionable that the mere investment of money in property and a return of income in the form of interest or rental or dividends, without the furnishing of some services, or the employment of more than nominal personnel in the management of the property, or the establishment of an office or headquarters would amount to a business establishment.

If plaintiffs' contention is correct a business establishment would include the person who offers one room in his own home for rent as well as the owner of a large chain of apartment houses, for their contention offers no distinction between large, medium, or small property owners. So far it does not seem the reasonable interpretation that the section as amended was intended to apply to the present case. Perhaps, an examination of the legislative history of the bill will furnish a guide to the intent of the Legislature. The history of the bill itself gives little help for there are no records of any discussion at any hearings, merely changes in the bill which do not seem to apply specifically to the housing feature. The examination of another bill adopted during the 1959 session of the Legislature does seem to help. This bill is entitled "Discrimination in Publicly Assisted Housing," and is found in Sections 35700 and 35741, Health and Safety Code. This act in general prohibits discrimination on the basis of race, color, or creed in all "*publicly assisted housing accommodations.*" In this bill the term "housing accommodations" is specifically defined as:

> "Any building, structure, or portion thereof, which is used or occupied as the home, residence, or sleeping place of one or more human beings."

In addition there are refinements of the act which limit its application to rentals of multiple dwellings and sales of five or more housing accommodations.

By omitting similar or detailed definitions from the amendment of CC 51 it would seem that the Legislature never intended the section to apply to rental property such as owned by the defendants.

In addition there was introduced in the current 1961 session of the Legislature Assembly Bill 801. This bill seeks to amend the Discrimination in Publicly Assisted Housing Act by deleting the words "publicly assisted" so that the title reads: "Discrimination in Housing," and in general extends the operation of the section to all housing accommodations other than a single unit dwelling occupied in whole or in part by the owner of his residence. It is difficult to understand why such a bill would be introduced unless the Legislators felt that CC 51 was never intended to cover such a situation.

To apply the provisions of Section 51 of the Civil Code as requested by plaintiffs would be effecting a major change in the customs and practices of the people of this state in the sale and rental of residential property. It is unbelievable that the Legislature would make such a change without expressing itself clearly and

unequivocally such as was done in the "Discrimination in Publicly Assisted Housing Act."

The popular understanding of the words "accommodations" and "business establishments" and the intention of the Legislature as exhibited by the Discrimination in Publicly Assisted Housing Act in 1959, and the introduction of AB 801 in 1961 not only indicates a doubt that CC 51 was meant to apply to rental of residential property such as that owned by defendants but illustrates pretty clear and convincing proof that it was to be excluded from the operation of the section.

Defendants' motion for non-suit is granted, and judgment of non-suit entered for the defendants.

HOUSING
Fair Housing Practices—Colorado

J. L. CASE d/b/a J. L. Case and Company, Realtors, et al., Petitioners v. THE COLORADO ANTI-DISCRIMINATION COMMISSION and Gene Manzanares, et al., as members, and James R. Rhone, et ux., Defendants, v. THE COLORADO SPRINGS BOARD OF REALTORS, Inc., a Colorado Corporation, Intervenor.

District Court of El Paso County, Colorado, June 2, 1961, Civil Action No. 39682.

SUMMARY: Real estate agents sought to have an adverse order of the Colorado Anti-Discrimination Commission set aside by a Colorado district court. One defendant realtor owned, as an individual, a house in an all-white residential section. A Negro couple attempted to purchase this house from him, making an offer and delivering an earnest money note. The realtor then learned that the prospective purchasers were Negroes, and thereafter the offer was not accepted, but the house was sold to another realtor. The Negroes filed a complaint with the Colorado Anti-Discrimination Commission, alleging that defendant had refused to sell the house to plaintiffs because of their race, in violation of the Colorado Fair Housing Act of 1959 (4 Race Rel. L. Rep. 454). After a hearing, the commission found the real estate agents guilty of the discrimination charged, and directed them to give the complainants "the opportunity of purchasing a comparable home . . . in the same general neighborhood or a comparable neighborhood in Colorado Springs, Colorado . . . and under the same terms and conditions as such a home would be offered to any other person." 5 Race Rel. L. Rep. 541 (1960).

The district court held the main section of the Fair Housing Act unconstitutional, and directed the Commission to vacate its order. The court ruled that the Act was vague, indefinite, and an unlawful delegation of legislative power to an administrative commission, because the Act gave the Commission the power to require a "respondent . . . to take . . . such other action as in the judgment of the commission will effectuate the purposes of this act," and did not set any limits on or standards for such action. The court also ruled that the Commission's order was indefinite in not defining the rights and liabilities of third parties who listed their homes with the realtor, and that therefore it could not be "fairly and judicially enforced."

ENOCH, District Judge.

The Petitioners, J. L. Case, d/b/a J. L. Case and Company, Realtors, and Reuben M. Stovern, hereinafter referred to by their last names, seek to have set aside the Findings of Fact, Conclusions of Law and Order of the Colorado Anti-Discrimination Commission for reasons hereinafter stated and further ask that the *Colorado Fair Housing Act of 1959, 1959 Colorado Session Laws* be held and declared to be unconstitutional.

On September 18, 1959, James R. Rhone and Elizabeth O. Rhone filed a complaint before the Colorado Anti-Discrimination Commission wherein it was alleged that Petitioner Case violated the *Colorado Fair Housing Act of 1959* by refusing to sell certain real property (1609 Kingsley Drive, Colorado Springs, Colorado) to the Complainants because they were Negroes.

On October 13, 1959, an amended complaint was filed alleging that Nelson Merrill and Reuben M. Stovern, salesmen for Petitioner Case, did aid and abet said case in his refusal to sell the said property to Complainants because they were Negroes.

After considerable correspondence between the Commission and Petitioners' attorney, the filing of an answer and an amended answer in due time by the Petitioners, a hearing was held before the Commission on March 14, 1960.

At the hearing four members of the Commission were present represented by two attorneys from the State Attorney General's office. The Petitioners were present in person with counsel and the Complainants, Mr. and Mrs. Rhone, were present without counsel by their own choice.

The Commission entered its Findings of Fact, Conclusions of Law and Order May 12, 1960, being filed June 9, 1960. In due time this Petition was filed in this District Court as provided for in Section 7 of said Housing Act. After the filing of subsequent pleadings the matter came on for hearing before this court February 6, 1961. The Court previously granted to the American Civil Liberties Union, Colorado Branch, and the Colorado Springs Board of Realtors, Inc., the right to file briefs as Amicus Curiae.

This Court has had the benefit of two days of oral arguments presented by Counsels for the Petitioners and the Commission, written briefs from both counsel as well as written briefs of the Amicus Curiae. This Court has also studied all of the pleadings, correspondence, and testimony taken at the Commission hearing.

It should be noted that this was the first hearing held by a Commission under this new Housing Act. Also this is the first time that a Court has been called upon to review the action of this Commission in this respect.

Two basic questions are raised by the pleadings for determination by this Court.

I.

Are the Findings of Fact, Conclusions of Law and Order of the Commission Capricious and Arbitrary and Not Based upon Substantial Evidence?

For purposes of determining this question it must first be assumed that the said Housing Act is constitutional. The Petitioners raise many questions relative to the manner in which the hearing was held, the type of evidence admitted and the general attitude of the Commission. Careful reading of the transcript indicates that there was considerable confusion during the hearing as to procedure and would certainly give cause to alarm counsel in his attempt to represent his client. The attitude of the Commission is pretty well summed up at Folio #273, after a discussion over the procedure, where the Chairman said "Very good, we will formulate our rules as we go along." Section 4(a) of this Housing Act gives the Commission the power and duty to adopt, amend and rescind rules for governing its meetings. It would normally be assumed that such rules would be determined before a hearing starts and made known to counsel. The fact that this was the first hearing no doubt is the reason for the confusion in the procedure but does not excuse the Commission of its responsibilities. However, the main question is whether this confusion of procedure jeopardized the Petitioners' rights and prevented them from having a fair hearing. It is the opinion of the Court that in this particular case it did not.

Objection is made as to the evidence upon which the Commission based its findings and order. The Court is obligated to uphold the findings and order of the Commission if supported by substantial evidence. In fact, Section 7(6) of the Housing Act provides that "The findings of the Commission as to the facts shall be conclusive if supported by substantial evidence." The question for determination is what constitutes "substantial" evidence. Section 6(11) of said Housing Act provides that "The Commission shall not be bound by strict rules of evidence prevailing in courts of law or equity . . . ." A great deal of evidence was heard by the Commission which certainly would not have been admissible in a court of law or equity. This is amplified by the statement of Chairman reported at Folio #159 of the transcript, "We are going to let everything in and attempt to evaluate it as best we can." This presents quite

a problem to the Court when the Commission has made no effort to screen the testimony or evidence as to its competency, materiality or relevancy in the case. However, so long as the transcript preserves all of the testimony for subsequent judicial review the rights of the Petitioners are not infringed upon if the Court can upon reading the transcript separate the different types of evidence.

In this case there is substantial evidence that Respondent Case as an individual owned the house in question; that the house was advertised for sale and the Rhones made an offer to purchase by the execution of an instrument termed "Receipt and Terms of Purchase" which was prepared by Nelson Merrill, at that time a salesman for J. L. Case and Company; that Nelson Merrill presented the offer on a Thursday along with a note for $500 from the Rhones to Petitioner Case; that Nelson Merrill later the same day tried to talk the Rhones out of buying the property in question because they were Negroes; that Petitioner Case did not accept the offer submitted by the Rhones; that on the following Monday morning Petitioner Case conveyed title to said property to Petitioner Stovern who was also a salesman for J. L. Case and Company; that Petitioner Stovern did not move into or live in the house, and approximately eighteen days later conveyed title to the property to one Verne W. Deighton, another real estate salesman. There was evidence by the Respondent Case that the sale to Respondent Stovern was on better terms than that offered by the Rhones and is thus argued that the offer of the Rhones was not accepted because of their color but because a better offer had been presented.

The Commission in effect determined that the sale to Respondent Stovern was not a bona fide transaction in good faith and that it was set up for the sole purpose of circumventing the provisions of the Housing Act in question. It is the opinion of this Court that, although a court might have reached a different conclusion had the matter been tried to a court, there was substantial evidence to support the findings, conclusions and order of the Commission.

The Petitioners further complain of the attitude of the Commission and the atmosphere of partiality for the Complainants Rhones. The Court finds no evidence of any attitude or atmosphere at the hearing which would justify a reversal of the Commission's order.

Considering the legislation under which this Commission was required to operate, it is the opinion of the Court that the Findings of Fact, Conclusions of Law and Order of the Commission were not capricious and arbitrary, and were based upon substantial evidence.

II.

Is the Colorado Fair Housing Act of 1959, 1959 Colorado Sessions Laws, Chapter 148, Constitutional.

In determining this question it is not within the province of this Court to declare this Act to be constitutional or unconstitutional academically. The real question to be decided by this Court is whether the *Colorado Fair Housing Act of 1959*, supra, is constitutional or not as it applied to the Respondents in this particular matter. However in so determining, it becomes necessary to evaluate the various provisions of the Act in relation to our Colorado and United States Constitutions. The Court is cognizant of the presumption of constitutional validity given by law to an act of the legislature and, further, that the burden of proof is upon the person attacking an act upon constitutional grounds. *Ashwander vs. Tennessee Valley Authority* 297 U.S. 288, 56 S. Ct. 466, 80 L.Ed. 688 (1936), and *Sharpless vs. the Mayor of Philadelphia* 21 Pa. 147, 59 Am. Dec. 759, *Union Cemetery Association of the City of Lincoln vs. Cooper*, 414 Ill. 23, 110 N. E.2d, 239, *Stewart vs. Brady* 300 Ill. 425, 133 N. E. 310.

It should be made clear at the outset that the question here is not whether it is morally or legally wrong or right to discriminate. It has been well settled by our State Supreme Court and our United States Supreme Court that the guarantees, rights and privileges under our constitutions are for the benefit of all our people regardless of race, creed, color, national origin or ancestry, and this Court would be the first to support this basic principle. The question here is the validity of the particular statute and its application.

The Court directs its attention first to the *Colorado Fair Housing Act of 1959, 1959 Colorado Sessions Laws, Chapter 149 et seq, Section 6 (12)* which is the heart of the law in that it purports to tell the Commission what it can do if it is found that an unfair housing practice exists in a particular case and likewise this section should advise the public of the consequences of a violation of this Housing Act. Said *Section 6(12)*, supra, provides as follows:

"If, upon all of the evidence at a hearing, the commission shall find that the respondent has engaged in or is engaging in an unfair housing practice as defined in this act, the commission shall state its findings of fact and shall issue and cause to be served upon such respondent an order requiring such respondent to cease and desist from such unfair housing practice and to take such affirmative action, including (but not limited to) the transfer, rental, or lease of housing; the making of reports as to the manner of compliance and such other action as in the judgment of the commission will effectuate the purposes of this act."

Clearly and without question in the mind of this Court this sub-section is vague, indefinite and an unlawful delegation of legislative power to an administrative commission. What did the legislature mean by the words "and such other action"? Is there no limit to the authority and power of this Commission? The legislature can delegate duties and responsibilities to carry out well defined functions but our Supreme Court has held over and over again that the legislature and not an administrative commission or board has the power and duty to determine the standards and limits for the administration of a law. *Chenoweth vs. the State Medical Examiners* 57 Colo. 74, 141 Pac. 132, 51 L.R.A. (N.S.) 958, *Colorado Company vs. Railroad Commission* 54 Colo. 64, 129 Pac. 506, *Casey vs. The People* 139 Colo. 89, 336 P2d 308. The failure of the legislature in this situation to define and limit the authority of this Commission resulted in an order against Respondent Case which is unrealistic, indefinite in itself, virtually impossible to comply with, and might of itself be a violation of constitutional rights of third parties who are not even a party to this action. Attention is directed to the Commission's Order, Paragraph 2, at Folio #104 of the transcript. It should be kept in mind that Respondent Case as an individual owned the house in question, not the real estate firm which he owned, yet the order requires him to make available to the Complainants the opportunity to purchase any comparable home from the homes listed with him in his capacity as a licensed real estate broker. There is no evidence that Case or his firm owned any other houses. Thus it could only mean that Case must make his confidential office records available to determine what comparable homes are listed, and further would require him to give the Complainants the opportunity to purchase property which might be listed for special conditions and under certain limitations by the owner. What if Case does give these Complainants an opportunity to purchase a particular house and the owner for one reason or another withdraws the listing before any contract is offered for his acceptance? Do we again have circumstantial evidence of a violation of this Act by the unsuspecting owner?

Another test that might be applied as to the validity of this order is the enforceability of the order itself. Section 7(1) of this Act says that the Commission may obtain an order of Court for the enforcement of its order. Even if it could be determined what a comparable house and a comparable neighborhood might be it does not appear that such an order could be fairly and judicially enforced. In Paragraph 3 of the Commission's order, Folio 105, Respondent Case is ordered to inform the Coordinator of the Commission within thirty days from the date of this order and at thirty-day intervals thereafter, concerning the manner in which he has complied with this order. In what manner does the Respondent report and for how long must he continue to report? Does the Commission by virtue of this one complaint have a continuous and never ending jurisdiction over the Respondent? Part of this order, Paragraph 1, Folio 103, requires Respondent to cease and desist in the future from engaging in or committing any unfair housing practice as defined in said Act. In addition to reporting on the success of finding a house for these Complainants, must Respondent report every thirty days hereafter and forever that he has not engaged in or committed any unfair housing practice? Ridiculous as this may seem when analyzed, yet the Commission did not abuse its authority because the legislature in *Section 6(12)* supra, said, that the Commission could take such other action as in its judgment will effectuate the purposes of this Act.

It is the opinion of this Court that for the reasons above stated there is no question but that *Section* 6(12) of this Housing Act is unconstitutional as applied to the facts of this case and therefore the Findings, Conclusions and Orders of the Commission made thereunder are void.

Many other constitutional questions are raised by counsel. Since this Court is holding that *Section 6(12)* of the Act is unconstitutional, such questions so raised are not essential to the determination of this case; however, since this

is a case of first impression, the Court feels compelled to express briefly grave doubts concerning some of these other problems.

Attention is called to the definition of "Housing" *Section* 3 (c). Two very able counsel argued this case before this Court and they even disagree as to this definition. Is a private home owner, who is living in his home, subject to the provisions of this Act if he puts his home on the market for sale, or is he exempted by the last phrase of the definition. *Colorado Fair Housing Act of 1959*, supra, *Section 3(c)*

> ". . . . but does not include premises maintained by the owner or lessee as the household of his family with or without domestic servants *and* not more than four boarders or lodgers."

A logical interpretation is that he is not exempt, he is exempt only if living in the premises with his family *and* has not more than four boarders or lodgers. A determination of this question is not necessary in this case, however it is certainly not clear, and is further indication of the vagueness and indefiniteness of this Housing Act. The Respondent is charged with the violation of *Section 5(1) (a) (i)* supra "To refuse to transfer, rent or lease or otherwise to deny to or withhold from any person or persons such housing because of race, creed, color, sex, national origin or ancestry." Consider this section along with the *Section 6(12)* previously referred to wherein the Commission is given the power to take "affirmative action including (but not limited to) the transfer" etc. The Commission found in its findings that Respondent did refuse to transfer, and further found that there was no contract to transfer only an offer existed which was not accepted. Can it be that the legislature is now, under the guise of the police powers of the state, legislating as to the rights of a private person to own, possess and dispose of his personal property to whomever he sees fit, and further delegating to an administrative body the power to determine the right of ownership of property *and order a conveyance thereof where there has been no contract between the parties*?

Legislation such as this is not protecting the right of our minority groups as it was undoubtedly intended to do, in fact it is doing just the opposite. It is taking from the minority groups one of the most cherished constitutional rights which they have been struggling for so long, the right and freedom to contract and to deal with and sell to whom one pleases. This legislation would apply to all people and the minority groups would be just as restricted and restrained by its application as any other group.

Many cases have been cited by both the defendant and the American Civil Liberties Union in support of this Housing Act, however none of them are applicable in that they all deal with *public* housing, *public*-financed housing, or matters where a service or commodity is regularly offered to the public in the normal course of business and do *not* deal with *private* housing. Actually, insofar as this Court is advised, the case at bar is a case of first impression. It is the opinion of this Court that to uphold such legislation as this would require a distorted construction of our constitutions and would require the reversal of many case decisions heretofore protecting the right of a private individual to privately contract on his own terms. Following are some cases dealing with the right to contract:

Shelley et ux. v. Kraemer et ux. 334 U.S. 1. involved a determination by the United States Supreme Court of the validity of restrictive covenants restricting the sale of property to persons of African descent. The case involved a determination of the validity of covenants decided by the Supreme Court of the State of Missouri and the Supreme Court of the State of Michigan.

The Court said that the question to be decided was,

> *"Does Judicial enforcement of restrictive covenants based on race or color violate the equal protection clauses of the Fourteenth Amendment to the United States Constitution?"*

The Court said that this is the first time they had been called upon to determine this issue and answered the question in the affirmative.

Page 10 of the opinion, the Court said the following:

"It cannot be doubted that among the civil rights intended to be protected from discriminatory State action by the 14th Amendment are the rights to *acquire, own, enjoy and dispose of property.*"

At *Page 13* of the opinion, the Court said the following:

"Since the decision of this Court in the Civil Rights Cases, 109 U.S. 3 (1883), the principle has become firmly imbedded in our

constitutional law that the action inhibited by the first section of the 14th Amendment is only such action as may fairly be said to be that of the State's. *That Amendment erects no shield against merely private conduct however discriminatory or wrongful.* We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any right guaranteed to petitioners by the 14th Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

Buchanan v. Warley is reported in *245 U.S. 60.* This case involved an action by a white person against a negro for the specific performance of an agreement to sell real estate. An Ordinance of the City of St. Louis provided that "colored persons could not own or occupy houses in a block predominantly occupied by whites and vice versa." The plaintiff contended that the ordinance was unconstitutional and the Court held that it was unconstitutional notwithstanding the fact that it applied equally to both races. The Court at *Page 62* of the opinion said the following:

"The constitutional guaranty of equal protection, without discrimination on account of color, race, religion, etc., includes 'the right to acquire and possess property of every kind' citing cases; *to dispose of it and to live upon one's own land.*"

This case involved a voluntary offer and an acceptance of the land involved. The Court held that the ordinance violated the equal protection and privileges and immunities clauses of the 14th Amendment.

At *Page 80* of the opinion, the Court said the following:

"That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. *But its solution cannot be promoted* by depriving citizens of their constitutional rights and privileges."

At *Page 82* of the opinion, the Court said the following:

"We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the 14th Amendment of the Constitution preventing State interference with property rights except by due process of law."

In *Great Atlantic & Pacific Tea Co. vs. Cream O'Wheat,* 227 Fed. 46, the court said at Page 48:

"We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern.

"'It is a part of a man's civil rights that he is at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or as a result of whim, caprice, prejudice or malice. Cooley on Torts, Page 278.'"

"Before the Sherman Act, it was the law 'that a trader might reject the offer of a proposing buyer for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial or social.' . . . . We have not yet reached the state where the selection of trader's customer is made for him by the government."

Attention is also directed to the Act, supra, *Section 6(9)* wherein the event of a default hearing "The Commission may enter such order as in its opinion the evidence warrants. Again we find another unlawful delegation of power by the legislature to the Commission. The legislature has delegated the power to the Commission to write further provisions into this law as to type of order, penalty, restriction or other action solely at the discretion of the Commission.

FINDINGS OF FACT

The Court has heretofore set forth its findings of fact in the above opinion and hereby adopts said findings so made as the findings of fact in this cause.

CONCLUSIONS OF LAW

The Court concludes:

1. That *The Colorado Fair Housing Act of*

1959, 1959 Session Laws, Chapter 148, Section 6(12) is repugnant and contrary to the *Constitution of the United States, Article XIV Section 1,* and the *Constitution of the State of Colorado, Article II, Section 25,* as it applies in this cause in that said section is set forth with such indefiniteness and uncertainty so that an intelligent man cannot discover his duty thereunder, and,

2. That said *Section 6(12),* supra, is repugnant and contrary to the same Articles and Sections of said Constitutions in that said *Section 6(12),* supra, provides for an unlawful delegation of legislative authority, and,

3. That, as a consequence, the order of defendant, Colorado Anti-discrimination Commission, entered on May 12, 1960, is a nullity and is void and should be dismissed.

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED, that *The Colorado Fair Housing Act of 1959, 1959 Session Laws, Chapter 148, Section 6(12)* is adjudged to be unconstitutional and therefore null and void; IT IS THEREFORE ORDERED that this cause be, and the same is hereby, remanded to The Colorado Anti-Discrimination Commission; said Commission is directed to vacate its order of May 12, 1960, and dismiss the petition of Petitioners James R. Rhone and Elizabeth O. Rhone.

HOUSING
Privately-Owned—Connecticut

Albert SWANSON v. The COMMISSION ON CIVIL RIGHTS OF THE STATE OF CONNECTICUT.

Superior Court of New Haven County, Connecticut, July 11, 1961, No. 94802.

SUMMARY: A sub-division developer, who had refused to sell a house to a Negro couple, appealed to a Connecticut county court to set aside a cease and desist order of the Connecticut Commission on Civil Rights. 6 Race Rel. L. Rep. 345 (1961). Petitioner had divided his properties between two companies, and the court found that the purpose of this action was to avoid coverage by the fair housing act, which is applicable only to parcels of land on which 5 or more "housing accommodations" are located. The court upheld the constitutionality of the law as a reasonable regulation of the use of the property, and pierced the "corporate veil" to find parcels sufficiently large to encompass five building lots. However, the court held that the words "housing accommodations" in the statute require that five or more houses be built on the parcel before the statute can apply. Since there had been no showing that five houses had been erected at the time of the Commission's order, the appeal was sustained.

LOISELLE, Judge.

MEMORANDUM OF DECISION

At the outset of this appeal, the petitioners claimed that the complaint was not filed within ninety days of the grievance, which was completed on March 10, 1960.

Under the provisions of General Statutes § 53-36, the commission, itself, can issue a complaint. The statute then states that the commission may "thereupon" proceed in the same manner and with the same powers as provided in chapter 563. The provisions of chapter 563 do not become operative until a complaint is filed by a person aggrieved, or, one is issued by the commission. Even if they did become operative previous to such filing, the ninety day provision in § 31-127 would not be applicable to a complaint issued by the commission.

The petitioners also claimed that the proceedings were against public policy in that the commission investigated and then determined the case. In this instance the Attorney General's

office prosecuted the case, and the petitioners, who have the right of appeal to this court, are now exercising that right. The statute provides for a hearing after notice, and that is the only essential for due process. Romanov v. Dental Commission (1955) 142 Conn. 44, 52.

The fact that the complaint was signed by the executive secretary does not abate the action. General Statutes § 53-36 authorizes the commission to issue a complaint. This complaint should have been issued by the commission. Even though the complaint was signed by their representative, such technicality is overlooked when no substantial rights of the parties are affected. Practice Book § 471; Guilford v. Landon (1959) 146 Conn. 178, 180.

The petitioners claimed that P.A. 113 enacted in 1959, which amended General Statutes § 53-35, is unconstitutional.

General Statutes § 53-35, as amended, is an anti-discrimination law passed by the legislature under the police power of the state to serve the public welfare.

The validity of General Statutes § 53-35 as a whole is not attacked, but only the 1959 amendment thereto. This being so, the rule that a party cannot attack a statute under which he is appealing is not applicable. Florentine v. Darien (1955) 142 Conn. 415, 429; Vartelas v. Water Resources Commission (1959) 146 Conn. 650, 653.

The petitioners' position is that the 1959 amendment to General Statutes § 53-35 is unconstitutional in that it deprives them of their property without due process of law; it interferes with their right of contract; it affects their right to own and dispose of property as they see fit; and the law discriminates as to certain real estate owners solely on the basis of the arrangement and use of their real estate without justification therefor.

An owner of property has a fundamental right to use and enjoy his property in the manner most desirable and profitable to him. 16 C.J.S. § 209. This right, however, is subject to the principle that all property is held subject to the right of the state reasonably to regulate the use under the police power in order to serve the general safety and public welfare of the state. The State v. Hillman (1929) 110 Conn. 95, 105; 11 Am. Jur. 1009, § 268. Where the constitutionality of an act such as the 1959 amendment to General Statutes § 53-35 is attacked, the guideposts which the Court should follow are clearly enumerated in State v. Gordon (1956) 143 Conn. 698, 703.

Constitutionality is presumed unless it is clearly shown otherwise. Schwartz v. Kelly (1953) 140 Conn. 176, 179. The burden of proof is upon the petitioners to show that the enactment is unconstitutional. State v. Shuster (1958) 145 Conn. 554, 560.

The legislature, comprised of elected representatives of the people have broad discretion in determining what is best for the general welfare of the state. The policy adopted by the legislature and approved by the governor is for them to decide and not for the courts to override when such policy is declared by the legislature. Carroll v. Schwartz (1940) 127 Conn. 126, 129. Courts can interfere only when the action taken by the legislature is unreasonable, discriminatory or arbitrary. State v. Gordon, supra, 703.

It has long been the belief, at least in this country, that race, creed or color should not be a factor in the amount of right or liberty enjoyed by an individual. This belief has been implemented by our legislative bodies in the enactment of anti-discriminatory laws such as the one in issue.

These laws do not state that because a person is a member of a group, be it any type of race, creed or color, he is a desirable individual. They state, conversely, that because a person is a member of a minority group, be it of any type of race, creed or color, he is not, ipso facto, an undesirable individual. Martin v. City of New York (1960) 201 N.Y. S. 2d 111.

Under the common law no person has the "civil right" to purchase or lease any property he desires if the owner does not wish to sell or lease to him. 14 A.L.R. 2d 154. The amendment under consideration is not an enactment that directs all property owners to sell or rent to anyone who offers to buy or rent. It is directed to owners and so-called developers of land whose business is to build, sell and rent numerous houses in a so-called building development and to owners and builders of multiple dwellings who make it a business to engage in the selling or leasing of housing accommodations. It is these individuals who dominate and set the pattern of the housing market as a whole. The prohibition of discrimination in housing developments and in multiple dwellings may well go a long way to help eradicate bias and foster equal rights to all persons regardless of race, creed or

color, in the whole community. Although such developments and multiple dwellings may be private enterprises, the building, selling and renting of the units in these developments and multiple dwellings are businesses which have a substantial impact upon a community. Such being the case, they are subject to reasonable regulations which will serve the public welfare. This is so even if it can be shown that such regulations will result in some financial loss to the owner without provision for compensation therefor. "The due process clause does not prevent the State from making all the needful regulations for the public welfare, and does not require compensation to be made in case these regulations are reasonable, although they do deprive the owner of the use of his property". Windsor v. Whitney (1920) 95 Conn. 357, 369.

The petitioners state that the law discriminates as to certain real estate owners solely on the basis of the arrangement and use of their real estate. The legislature may constitutionally enact a regulation if there is a natural and substantial difference between those who come within the act and others and if that difference is logically related to the subject and objective of the legislation. State ex rel. Higgins v. Civil Service Commission (1952) 139 Conn. 102, 107. The statute as amended now includes developers, owners of dwellings within defined areas, and owners of multiple dwellings. They can reasonably be considered of a different status from other owners of real estate. Their mode of operation in both building and selling, as well as renting, is logically related to the subject and objective of this anti-discriminatory legislation. The question of classification is for the legislative body, and the courts will not interfere unless the classification is clearly unreasonable. Neuger v. Zoning Board (1958) 145 Conn. 625, 633. It is also apparent that the legislature has not hastily attempted to cover all fields of discrimination at one time but has gradually enacted legislation where it felt it was most acute at the time. This step by step classification is not only desirable, but is mentioned as a more orderly procedure. Williamson v. Lee Optical of Okla. (1955) 384 U.S. 483, 99 L. Ed. 563, 573. The Court cannot say that there was no reasonable basis for the classification or that the classification has reached a point without a distinction between individual owners of real property and developers, or owners of at least five housing accommodations within a defined area and owners of multiple dwellings.

General Statutes § § 53-55 and 53-36 cannot be found to be unconstitutional.

In May, 1959, Albert Swanson Inc. owned all of the building lots in the development located in the Town of Hamden known as Benham Lane Heights, except those already sold to individual home owners. Albert Swanson was the principal stockholder and the dominant personality in Albert Swanson, Inc.

Sometime in May, 1959, Mr. and Mrs. Dewitt Jones were interested in purchasing a home in this development. Albert Swanson, the president of Albert Swanson, Inc. refused to enter into a contract to sell them a house for the reason that they were negroes and that if such a sale was made he felt it would jeopardize his investment in the development.

The 1959 amendment to § 53-35 was signed by the Governor on May 12, 1959, and its effective date was October 1, 1959.

In September, 1959, a corporation called E.F.S., Inc. was formed, the letters being the initials of Mrs. Swanson, the wife of Albert Swanson, and the incorporators being Mrs. Swanson, her father and her mother. Mrs. Swanson and her father were the sole subscribers to the stock, she, subscribing for forty-nine shares, and he, for one share. The initial capital investment of $5,000 was borrowed from Albert Swanson, Inc.

On September 30, 1959, Albert Swanson Inc. transferred to E.F.S., Inc. certain building lots in Benham Lane Heights (together with other lots not involved in this proceeding) which resulted in a situation where neither corporation owned more than four contiguous lots in the development.

The purpose of the transfer was to evade the effect of the amendment to § 53-35 which became effective on October 1, 1959.

On September 29, 1959, E.F.S., Inc. gave two notes to Albert Swanson, Inc. One note for $5,000 was to cover the original issue of E.F.S., Inc. stock, and the other for $45,000 was to cover the purchase price of the above mentioned lots.

It could be found that Mrs. Swanson knew very little of the affairs of E.F.S., Inc.

Albert Swanson fixed all sales prices of all houses in the development as well as the prices that Albert Swanson, Inc. would charge for buildings erected on lots owned by E.F.S., Inc;

and also what the selling prices to purchasers would be for E.F.S., Inc. All funds received by E.F.S., Inc. through sales were remitted to Albert Swanson, Inc.

In October, 1959, Mr. and Mrs. Jones, through a real estate agent, made another attempt to purchase a home in the development and they were refused. On March 10, 1960, a representative from the Commission on Civil Rights made a further attempt in behalf of the Jones' to buy any house in the development but Albert Swanson refused to sell for the aforementioned reason, that is, because the Jones' were negroes.

The petitioners Albert Swanson, Inc. and E.F.S., Inc. claim that they do not come within General Statutes §53-35 because neither corporation owns more than four contiguous lots in the development.

From the recitation of facts hereinbefore made, the Hearing Tribunal could very well find that the motive behind the forming of E.F.S., Inc. was to evade General Statutes § 53-35. Winestine v. Rose Cloak and Suit Co. (1919) 93 Conn. 633, 636. It could further be found that as Albert Swanson controlled Albert Swanson, Inc. he had his wife form E.F.S., Inc. as a mere instrument to accomplish the evasion of General Statutes § 53-35, and that he had actual control of E.F.S., Inc. even though he neither had stock in E.F.S., Inc. nor was an officer of that corporation. Where such a corporation is so formed, the Court may look beyond the so-called "corporate Veil". Hoffman Wall Paper Co. v. Hartford (1932) 114 Conn. 531, 534; 13 Am. Jur. 161, § 7. The case of State v. Harris (1960) 147 Conn. 589, 595 is not authority for the converse of what is therein stated. The Harris case in effect states that the piercing of the "corporate veil" is not a two-way street and that the corporate entity cannot be cast aside to suit the purpose of its stockholders. It can be cast aside only when a corporation is used to accomplish an ulterior purpose.

The Hearing Tribunal could very well find, and it seems to the Court to be an inescapable conclusion, that Albert Swanson did control Albert Swanson, Inc. and E.F.S., Inc. and that these two corporations did own five or more contiguous lots without regard to highways and streets and upon which lots were to be built structures which would be housing accommodations.

In order to hold that the petitioners have violated § 53-35 as amended, it is necessary to find that there were five or more "housing accommodations" all of which are located on a single parcel of land or parcels of land that are contiguous.

The Court has read the entire transcript of the hearing held in the fall of 1960. No evidence was produced at the hearing to show that there were at least five housing accommodations in erected dwelling buildings or multiple dwellings or a combination thereof for sale located within the entire development in October, 1959, or in March, 1960.

In paragraph 3 of the Findings of Fact, it is stated that on or about October 28, 1959, and until the present time, there were a number of houses unsold and offered for sale to the general public. Nowhere in the evidence can it be found that there were at least five housing accommodations in existing structures whether in five single houses or in a multiple dwelling or a combination of both.

The briefs of all parties argue as a fact that there were not at least five housing accommodations in the existing structures for sale in the Benham Lane Heights development. Although not specifically stated, the Findings of Fact, and the conclusions of the Hearing Tribunal, indicate that there were not at least five housing accommodations in the existing structures during the time in question. The issue to be determined in this respect is whether or not paragraph 2 under the conclusions of the Hearing Tribunal can be supported as a matter of law wherein it is stated, "That the sale of a parcel of land with a house to be built thereon is a 'housing accommodation' within the scope of the Statutes of the State of Connecticut, Section 53-35, as amended."

The evidence is clear that a model house was built on the development and, from such model, contracts were entered into for the sale of houses. The petitioners advertised completed houses for sale. The petitioners would not sell just a lot in the development, but only completed houses. It is the contention of the Commission on Civil Rights that a lot upon which a dwelling house is to be built in the future is a "housing accommodation" within General Statutes § 53-35.

General Statutes § 53-35 prohibits a course of conduct which the legislature has decreed to be prejudicial to the public welfare and a punishment is provided for a violator. This renders

the statute penal in nature and as such it must be strictly construed. Dennis v. Shaw (1951) 137 Conn. 450, 453. It is true that the present action is not a criminal proceeding but the statute to be construed is General Statutes § 53-35.

The usual and natural meaning of words is to be followed in construing statutes. General Statutes § 1-1. And the language should not be enlarged to include something not expressed unless the context of the statute indicates the same. State ex rel. Higgins v. Civil Service Commission (1952) 139 Conn. 102, 114. The question for the Court, in construing statutes, is not what did the legislature actually intend, but, what intention has it expressed in the language used. McAdams v. Barbieri (1956) 143 Conn. 405, 415.

The statute states that "a place of public accommodation" means any housing accommodation "which is one of five or more housing accommodations". The statute is in the present tense. To interpret that such language includes a housing accommodation to be built in the undetermined future would lead to guess, speculation and conjecture. Further, the statute states, "... which is one of five or more housing accommodations all of which are located on a single parcel of land or parcels of land that are contiguous...". This connotes a structure of some type which is presently located in the area defined. This is clear from the use of the words "are located on". The word "are" is defined to be a verb form supplying the present indicative plural of the verb "be". Webster's New International Dictionary, Second Edition. The language is not ambiguous and that being so, there is no room for statutory construction to include structures to be built in the undetermined future. State ex rel. Coiley v. Kegley (1956) 143 Conn. 679, 683. Although not in point, it is noteworthy that the Federal Emergency Price Control Act defined a "housing accommodation" as an existing structure. Young v. Margiotta (1950) 136 Conn. 429, 434. To interpret the use of the words "housing accommodations" as including empty lots upon which dwellings are to be constructed in the future, renders the statutory language stating "which are located on" pointless. A rule early established in construing statutes is that such statutes ought to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant. Barstow v. Adams (1805) 2 Day, 70, 98.

The Court can come to no other conclusion but that the phrase "housing accommodation" as used in General Statutes § 53-35 means structures for shelter or dwellings, already in existence.

The conclusion of the Hearing Tribunal in this action that a sale of a parcel of land with a house to be built thereon is a "housing accommodation" within the scope of General Statutes § 53-35 as amended, is found by this Court to be erroneous.

That being so, necessarily the ultimate conclusion that the petitioners violated General Statutes § 53-35 cannot stand; nor can the order to cease and desist be sustained.

The appeals in the three above-entitled cases are sustained.

HOUSING
Privately-Owned—New York

Paul W. KATES, et al. v. Louis J. LEFKOWITZ, Attorney General of the State of New York.

Supreme Court, Special Term, New York County, Part I, June 19, 1961, 216 N.Y.S. 2d. 1014.

SUMMARY: An apartment-owning corporation and its principal officer petitioned a New York Supreme Court to vacate a subpoena issued by the state attorney general. A Negro woman had filed a complaint with the State Commission Against Discrimination, alleging that the petitioning corporation and another apartment owner had refused to rent to her on account of her color. The commission determined that it had no jurisdiction of the matter, because its jurisdiction had been limited to "publicly-assisted" housing at that time and the apartments had been privately financed. The state attorney general then authorized an inquiry into the basis of the complaint, and issued the subpoena, acting under his statutory author-

ity to prevent repeated illegality in the conduct of any business and citing the state anti-trust law as the statute violated. The court held that, since petitioners' discrimination was not illegal at the time of the acts charged in the complaint, parallel action by different apartment owners could not in and of itself "create the necessary inference" of an illegal agreement among them. The court therefore vacated the subpoena on the ground that the inquiry was a "fishing expedition," as there was no reasonable basis for a belief that evidence of an anti-trust violation was obtainable.

GELLER, Justice

This is an application by Rye Colony, Inc., owner of a large apartment development in the city of Rye, New York, and one of its principal officers served in an individual capacity, to vacate a subpoena issued by the Attorney General for the purpose of conducting an inquiry based upon a complaint by a Negro woman that they had refused to rent a vacant apartment to her.

Preliminarily, it should be observed that a judge, in deciding a case involving a controversial matter of significant policy, must be careful to distinguish between his views as an individual and his function as a judge. In this case the court must put to one side, difficult as it may be, its personal feelings against racial discrimination in any form and render its determination solely on the basis of the applicable law. A judge may not make, but only interpret, the policy of the state either expressed in or implied from its constitution, legislative enactments and common law.

A review of the development of the law in this state banning discrimination in housing and an account of the background of events and proceedings taken in this matter leading up to this application, will help to set the problem in proper focus.

Article 15 of the Executive Law, known as the "Law Against Discrimination," was directed at first solely to the problem of discrimination in employment and then extended to places of public accommodation, resort or amusement. A state agency, known as the State Commission Against Discrimination ("SCAD"), was created with power to eliminate and prevent such discrimination "because of race, creed, color or national origin," for which purposes it was given "general jurisdiction and power" (§ 290). The Commission was given the power and duty to "investigate and pass upon complaints alleging violations of this article," to subpoena witnesses, require the production of books and records, and hold hearings (§ 295).

Effective July 1, 1955 the Article was amended to include the subject of discrimination in housing. But the ban against discrimination was limited by the new legislation to "publicly-assisted housing accommodations," i. e., those assisted financially with public funds, and was not made applicable to private housing accommodations. It declared it to be an unlawful discriminatory practice for an owner, managing agent, etc., of "publicly-assisted housing accommodations" to refuse to rent to any person because of race, color, creed or national origin, or to discriminate against such person with respect to terms, conditions, privileges, facilities or services (§ 296).

This was the limited state of the applicable law at the time that this complaint was filed and processed. (It may be noted that in 1957 the Administrative Code of the City of New York was amended by adding a provision—§ X41—1.0, the so-called Sharkey-Brown-Isaacs Law—banning such discrimination in the City of New York in private multiple dwellings and in the sale or rental of ten or more contiguous 1- and 2- family houses under single ownership or control, and further broadened by an amendment recently enacted. N. Y. Times, 6/17/61, p. 23).

This sworn complaint was filed only recently. Complainant stated that she was a Negro woman resident in Rye, New York, had been refused accommodations for her family in the apartment development known as Rye Colony owned and managed by petitioners, though there was vacancy at the time, and had been told that they would not rent to Negroes.

"SCAD", based on its finding that Rye Colony was not "publicly-assisted" housing, determined after investigation that it had no jurisdiction under the existing law.

But the law had just been amended to provide for the first time a State ban against discrimination with respect to private housing accommodations. Chapter 414 of the Laws of 1961, which became a law on April 11, 1961 with the approval of the Governor, extended the discrimination ban to private multiple dwell-

ings, ten or more contiguous houses under single ownership or control, and also to commercial space, as well as making it applicable to real estate brokers and lending institutions—(§ 296, new subdivision 5 added). As pointed out by the Governor in his Message approving the bill, sufficient funds were appropriated thereunder to permit "SCAD" to administer its provisions "in accordance with its State-wide exclusive jurisdiction."

This amendatory act is to take effect September 1, 1961. Obviously, after that date, "SCAD" will have jurisdiction of complaints of the type here involved and appropriate relief may then be obtained with a view to preventing and eliminating such practices in any multiple dwelling of the state.

In the meantime, however, complainant brought her complaint to the Attorney General, who, upon being notified on May 9, 1961 of the determination by "SCAD" of lack of jurisdiction at this time, authorized "an inquiry into the basis of the complaint and its pervasiveness." The subpoena under attack was issued on May 11, 1961, just about a month after the above-described liberalizing amendment was added to the law.

The subpoena refers to specific statutes as authority for the Attorney General's inquiry. The purpose is stated to be "to determine whether an application should be made or an action instituted, pursuant to § 63 (12) of the Executive Law, for an order enjoining the continuance of certain business activities of Rye Colony, Inc., and pursuant to Article 8 of the General Corporation Law, for the annulment of the corporate charter of said corporation on account of the persistent violation of § 340 of the General Business Law and other illegality."

Section 63(12) of the Executive Law was obviously intended as an expeditious measure to prevent the perpetration of repeated and persistent fraud or illegality in the conduct of any business. The Attorney General may apply to the Supreme Court on notice of five days for an order enjoining the continuance of such fraudulent or illegal acts. Since under existing law it is not illegal for the owner of private housing accommodations in the state outside of the City of New York to refuse to rent to Negroes, petitioners are not guilty of a violation of law in persisting at the present time in such refusal, and § 63(12) does not confer the requisite authority for an inquiry as to such act of refusal.

The general language of Article 8 of the General Corporation Law is, likewise, of little help in this context. Presumably the Attorney General is relying upon § 91, subd. 2, which authorizes him, upon leave being granted by the Supreme Court, to bring an action to annul the charter of a corporation which has "violated any provision of law whereby it has forfeited its charter." The provision of law, concerning which he seeks to make inquiry to determine whether it has been violated, is § 340 of the General Business Law.

We see, then, that the key to the solution of the problem lies in § 340. Unless there is some justification for an inquiry to determine if petitioners are guilty of violating it, there is no legal basis for any inquiry. It is clear from the Attorney General's supplemental memorandum that this is actually the only issue in the case.

Section 340 is the substantive section of Article 22, "Monopolies," (the Donnelly Act) of the General Business Law. It is the New York anti-trust equivalent of the Sherman Act. It declares as against public policy and illegal every agreement, arrangement or combination whereby a monopoly is established or competition or "the free exercise of any activity" is restrained. In 1957 it was amended to substitute in place of the relatively narrow field of its operations described as "in the manufacture, production, transportation, marketing or sale of any article or product or service used in the conduct of trade, commerce or manufacture" the broad and practically all-inclusive phrase, "in the conduct of any business, trade or commerce or in the furnishing of any service in this state."

The Attorney General takes the position that he may properly inquire whether there is an arrangement among the owners of the apartment developments in the city of Rye not to rent to Negroes. This is based upon the complainant's statement that she sought accommodations subsequent to her attempt at Rye Colony at one of the other Rye developments and was similarly refused on account of her color, and upon the statement of an Assistant Attorney General that it appears that none of the apartment developments erected in Rye since World War II are making any apartments available to Negroes.

The issue, then, is clear. Although under existing state law, discrimination in the rental of private accommodations by any owner is not

proscribed, the question is whether an agreement or arrangement among all the owners of a neighborhood area not to rent to Negroes constitutes an illegal arrangement in violation of § 340. If the answer to that question is in the affirmative, the final question will be to decide whether the circumstances relied on by the Attorney General in this case are sufficient to entitle him to subpoena the petitioners for the purpose of an inquiry as to whether they may be guilty of such a violation.

Regarding the first question—whether an arrangement between real estate owners not to rent to Negroes would constitute an illegal combination restraining the free exercise of any activity in the conduct of a business and thus violative of § 340—there seems to be no direct authority. Neither party has been able to discover any case in point. It seems to me that the broad language substituted by the legislature in the 1957 amendment of § 340 was intended to apply to the conduct of any business. There can be no question as to the renting of apartments being a business. If the owners of property in a certain section agree not to rent to Negroes, in addition to the restrictive monopoly thereby established against Negroes there will exist a restraint arising from the obligation undertaken and the pressure of the group upon the free exercise of judgment on the part of individual members of the group who might, if not subjected to such influence or coercion, be later inclined to change their views. The Sherman Act, the prototype of our § 340, has been invoked to attack an agreement among 39 New York City lending institutions to refuse to lend mortgage money to persons owning property in areas where Negroes and Spanish-speaking persons lived; the federal anti-trust suit was terminated without a trial by a consent judgment, whereby defendants dissolved the newly-formed organization (U. S. v. Mortgage Conference of New York, Civil Action No. 37-247, Southern District of New York). Reference has also been had to the article "Application of the Sherman Act to Housing Segregation," 63 Yale Law Journal 1124 (1954), which discusses the manner in which the Sherman Act has been used to attack housing segregation in some aspects in which restrictive practices have been adopted. Although this particular problem of rental discrimination is not touched upon in the article on the ground that such activities are entirely local in nature and covered, if at all, by state anti-trust legislation, my study of the subject would indicate that New York's anti-trust law —§ 340—may be broad enough to encompass within its prohibitions such an agreement by a combination of neighborhood property owners.

The final question to be answered, which is dispositive of this application, is whether this is a proper case authorizing the issuance of subpoenas by the Attorney General for the purpose of an inquiry to determine whether petitioners are guilty of a violation of § 340.

As may be expected, Article 22 of the General Business Law contains procedural sections for the enforcement of the provisions of § 340. Though not referred to in the papers before the court, § 343, "Investigation by the attorney general," is the most direct authority on the precise issue here involved. If taken literally, it would appear to give him practically unlimited power. It empowers him to subpoena witnesses, require the production of books and records, and obtain testimony whenever it appears to him that any person is engaging or about to engage in any prohibited act under the Article or participating or assisting therein "or whenever he believes it to be in the public interest that an investigation be made."

The Courts have held that there is a limit to the Attorney General's power to invoke compulsory process for such an inquiry.

In Carlisle v. Bennett, 268 N.Y. 212, at pages 217-218, 197 N.E. 220, at page 222, dealing with a similar question involving a similar investigatory provision (General Business Law, § 352) under the Martin Act relating to fraudulent practices in the sale of securities, the court said:

> "However broad the statutory language may be, the discretion must be exercised within bounds circumscribed by a reasonable relation to the subject-matter under investigation and to the public purpose to be achieved. So we have said that 'the statute does not commission the Attorney-General to embark upon any roving course for the purpose of generally prying into the affairs of any person.' Dunham v. Ottinger, supra, 243 N.Y. 423, 433, 154 N.E. 298, 300. * * *
>
> "Since there is a limit to the exercise of the Attorney General's discretion, the witness subpoenaed has the right to secure an adjudication as to whether that limit has been exceeded."

While the Attorney General may under the applicable statutes issue subpoenas and conduct an inquiry in an attempt to obtain evidence of a violation of § 340, there must be some reasonable ground for the belief that such evidence is obtainable. Otherwise, the inquiry is a roving and fishing expedition which constitutes an invasion of the fundamental right of an individual under our law to be free from the compulsory process of government unless there be present such facts and circumstances as, when developed, would warrant an implication of wrongdoing on his part.

The sole basis offered by the Attorney General for this inquiry is "that it appears that none of the apartment developments in the City of Rye are making any apartments available to Negroes, and that this condition may result from an arrangement between and among the project owners" (Supplemental Memorandum). It is stated that, perhaps, evidence of such an arrangement may be contained in the corporate minutes of petitioner corporation.

In the present posture of the law against discrimination, it is not, and until September 1, 1961 when the amended statute against discrimination takes effect it will not be, illegal for an owner of privately-financed housing in Rye to refuse to rent to Negroes (Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E. 2d 541, 14 A.L.R. 2d 133, certiorari denied 339 U.S. 981, 70 S.Ct. 1019, 94 L.Ed. 1385; New York State Commission Against Discrimination v. Pelham Hall Apartments, Inc., 10 Misc.2d 334, 170 N.Y.S.2d 750). The position of these owners on this question may simply be due to an identity of opinion which they are not forbidden by existing law from individually applying in their rental operations. Since, therefore, there is nothing illegal in such present refusal the fact that all of the owners of the recent apartment developments in Rye may refuse to rent to Negroes cannot in and of itself be the basis for an inference that it may be the result of an agreement or arrangement among them.

It is only cencerted action which is prohibited. It is true that circumstantial evidence of such an agreement would be sufficient, and that the concept has been adopted, at least in one leading case (Milgram v. Loew's, 192 F.2d 579, certiorari denied 343 U.S. 929, 72 S.Ct. 762, 96 L.Ed 1339), that "consciously parallel" action by persons in the same business may be sufficient to create an inference of a prohibited arrangement by a combination. But that concept, it seems to me, can properly be applied only in an industry involving closely interrelated activities or where the individual act itself, being prohibited in direct form by law, is indirectly contrived to be done by all of the persons in the group.

Thus, while present parallel action in refusing to rent to Negroes cannot alone create the necessary inference, the situation may well be different after September 1, 1961. It will then be illegal to refuse to rent to Negroes and a stronger case for the drawing of the inference may then be made, if the same condition of total non-availability to Negroes of vacant apartments in Rye continues to obtain, on the basis of the various excuses or explanations given by each of the owners for such refusal. Whether an inquiry along such lines on the basis of complaints would fall within the jurisdiction of "SCAD" as being a phase of the discrimination problem or within the powers of the Attorney General under the Donnelly Act or be cognizable by both, is a matter properly to be decided at that time. This Court obviously cannot disregard the legislative mandate that the new law becomes effective on September 1, or fill the vacuum which will exist until then by a legislative determination in the guise of a judicial ruling.

But, in any event, complainant's grievance will have a remedy after September 1, 1961. There would seem to be no practical utility in attempting by indirect means to correct a continuing situation which will so shortly become subject to a specific statute expressly designed to correct it. From this point of view the issuance of the subpoena after the enactment of the amendatory law but prior to its effective date would appear to serve little useful purpose. The new statute will become effective long before the powers asserted by the Attorney General in this proceeding can be finally tested in our appellate courts. Decision on this application, however, rests upon the lack of showing of such circumstances as to entitle the Attorney General to issue a subpoena compelling the attendance of petitioners for the purpose of an inquiry to determine whether they are guilty of a violation of § 340 of the General Business Law.

The application to vacate is accordingly granted.

Settle order.

ORGANIZATIONS
Human Rights—Alabama

F. L. SHUTTLESWORTH, et al. v. Eugene CONNOR, et al.

United States Court of Appeals, Fifth Circuit, June 12, 1961, No. 18838, _____F.2d_____.

SUMMARY: Members of the Alabama Christian Movement for Human Rights, an unincorporated association composed of Negroes dedicated to the proposition that racial segregation is evil and immoral, brought an action in federal district court against Birmingham police officials, seeking an injunction against their alleged practices of intimidating Negroes gathered to plan methods of removing racial segregation, and of forcing their way into meetings of plaintiffs designed to end such segregation in Birmingham. The district court denied the prayer for a temporary injunction upon finding that the officers had not interfered with those seeking to attend a meeting nor exercised restraint on proceedings thereat, and that there was no evidence that anyone had refrained from attending any meeting because of the officers' presence. It was declared that the public interest requires federal equity courts to exercise their discretionary power "with proper regard for the rightful independence of state governments in carrying out their domestic policy," and that such courts should be slow to grant injunctive relief unnecessarily interfering with lawful action of state officers. 5 Race Rel. L. Rep. 1150 (1960).

On appeal, the Fifth Circuit Court of Appeals affirmed, holding that the granting of a temporary injunction rests within the discretion of the district courts, and that there had been no abuse of discretion in this case.

Before JONES and BROWN, Circuit Judges, and DeVANE, District Judge.

PER CURIAM.

The district court entered an order denying an application for a temporary injunction. The plaintiffs have appealed from the order. Whether or not a temporary injunction is to be granted rests largely within the discretion of the district courts. It is not generally regarded as a matter of right. *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; *Home Decorators, Inc. v. Herfort*, 5th Cir. 1950, 179 F.2d 398; *Central Hanover Bank & Trust Co. v. Galloway*, 5th Cir. 1943, 135 F.2d 592. It does not appear that there has been any abuse of discretion and the order of the district court is

AFFIRMED.

PUBLIC ACCOMMODATIONS; GOVERNMENTAL FACILITIES
Golf Courses—Florida

Frank HAMPTON, et al. v. CITY OF JACKSONVILLE, et al.

United States District Court, Southern District, Florida, Jacksonville Division, June 22, 1961, No. 4073–Civil–J, _____F. Supp._____.

SUMMARY: In 1958, Jacksonville, Florida, Negroes brought a class action in federal district court for a judgment declaring their rights to use certain golf course facilities then owned by the city. In April, 1959, plaintiffs obtained a permanent injunction against racial discrimination in their operation. 4 Race Rel. L. Rep. 339 (1959). Thereafter, the city closed the facilities on the ground that integration would decrease their revenues and the city could not afford to operate them on an integrated basis. The city then offered the premises for sale to private purchasers on the condition that they be used only for golf courses. In November,

1959, plaintiffs sought injunctions from a Florida circuit court against any such sale, but the injunctions were denied, the court holding that the sale had not been an abuse of authority and that the city was not compelled to undertake the non-governmental function of operating recreational facilities. 5 Race Rel. L. Rep. 973 (1959). Thereafter, the city completed the sale of the facilities, retaining a possibility of reverter if the land should not be used for golf course purposes for twenty-one years.

Plaintiffs then brought the present action in federal district court seeking either an injunction against sale of the facilities by the city or an injunction against racial discrimination by the purchasers. The court refused to enjoin the sale, holding that the city had the right to sell in spite of the court's earlier injunction against discrimination, and that the sales were made in good faith. The court also refused to enjoin racial discrimination by the new private owners, holding that the possibility of reverter possessed by the city was insufficient to show "state action" in the control of their operation, and that private owners had a right to undisturbed possession and use of the facilities.

SIMPSON, District Judge.

ORDER DISMISSING PETITION TO MODIFY FINAL DECREE

This class action was commenced on July 7, 1958, by the above-named plaintiffs to have declared the rights of the plaintiffs and the class of persons they represent to use all the facilities connected with operation of the then Hyde Park Municipal Golf Course of the Brentwood Municipal Golf Course without discrimination on account of race or color and for injunctive relief. Plaintiffs thereafter on October 10, 1958, moved for summary judgment which said judgment was granted April 1, 1959, and a permanent injunction effective April 7, 1959, issued restraining the defendant, City of Jacksonville, its officers, agents, servants and employees and their successors in office, from refusing to allow the plaintiffs and other Negroes similarly situated to use said city-owned golf courses upon the same conditions as white persons are permitted to use the same. Thereafter on February 9, 1960, plaintiffs filed a petition to modify said final decree entered April 1, 1959. Thereafter on motion and order defendants Fred A. Ghioto and Roland Hurley were impleaded. The petition to modify said final decree asked that the defendant City of Jacksonville be enjoined from selling the two golf courses and that the purchasers of the two municipal golf courses be enjoined from refusing to permit the plaintiffs and other colored citizens similarly situated the use of said golf courses upon the same conditions as white persons will be permitted to use the same. The basic contentions made by plaintiffs in said petition were that the pending sales of the two golf courses and the transactions leading up to their sale were taken in bad faith, that the sales were not bona fide, were without adequate consideration, were an act of subterfuge to abridge the rights of plaintiffs and other colored citizens similarly situated from using said golf courses, and that the defendant city still retained an interest in said golf courses sufficient to require the purchasers to permit all citizens the use of same. The defendants answered denying the material allegations of the petition. At the trial of this cause and at the close of plaintiffs' case, defendants, City of Jacksonville, Roland Hurley and Fred A. Ghioto, moved the Court to dismiss the petition to modify the final decree on the ground that upon the facts and the law the plaintiffs have shown no right to relief.

The parties agreed at the trial that the entire court file in the case of Frank Hampton, D. W. Welcome and A. R. Richardson, Plaintiffs, v. City of Jacksonville, a corporation, its officers, employees, agents and servants, Defendants, in the Circuit Court of the Fourth Judicial Circuit of the State of Florida in and for Duval County, No. 59-3374-E, Division C, was available for the Court to examine and that judicial notice be taken of the pertinent matters contained therein.

FINDING OF FACT

1. The City of Jacksonville closed the Hyde Park Golf Course and the Brentwood Golf Course on April 6, 1959. Defendant city by Ordinance No. EE-16, passed by the City Council on August 11, 1959, determined and declared that said golf courses would no longer be operated as municipal golf courses of the defendant city and that the properties on which said golf courses were located were surplus to the municipal needs of the city and should be offered for

sale except certain property on the Hyde Park Golf Course necessary for the facilities of Radio Station WJAX, reserving on both courses certain easements, and authorized the City Commission to obtain appraisals and to advertise for bids, setting forth that the conveyance of the property should be by special warranty deed upon the express condition that the property shall be continuously maintained by the grantee and successors in title as a golf course and shall be used only for the purpose of a golf course; and if said property be not so maintained or if it should be diverted to other use said property shall immediately revert to the grantor, its successors and assigns. Pursuant thereto the golf courses were appraised, and advertised for sale a number of times upon written specifications, resulting in the final sales to the defendants Ghioto and Hurley.

2. On the 19th day of February, 1960, defendant City of Jacksonville sold the property known as the Hyde Park Golf Course to Fred A. Ghioto for the sum of $615,000.00, with $15,000.00 cash down payment and the execution by Mr. Ghioto of a purchase money mortage in the amount of $600,000.00 in favor of said city. The deed conveying said property was a Special Warranty Deed in standard form with the city retaining certain easements and a possibility of reverter. The possibility of reverter arose as a result of the following language: "This conveyance is made upon the express condition that the propetry hereby conveyed shall be continuously maintained by the grantee, his heirs, legal representatives and assigns, as a golf course and shall be used only for the purpose of a golf course, and if said property be not so maintained or should it be diverted to other use said property shall immediately revert to the grantor, its successors or assigns, and it shall be lawful for the grantor, its successors or assigns, to reenter and repossess said property and thereafter to peaceably hold and enjoy the same as if this conveyance had not been made."

3. On the 29th day of February, 1960, defendant City of Jacksonville sold the property known as the Brentwood Golf Course to Roland Hurley for the sum of $600,000.00, with $10,000.00 cash down payment and the execution by Mr. Hurley of a purchase money mortgage in the amount of $590,000.00 in favor of said city. The deed conveying said property was a special warranty deed in standard form with the city retaining certain easements and a possibility of reverter. The language in said deed which created the possibility of reverter in defendant City of Jacksonville is the same language quoted above as used in the Ghioto sale.

4. The two deeds and the two mortgages referred to above contained no restriction as to the use of the property with respect to race.

5. There was no proof at the trial of any sort that any racial restrictions were imposed by any side agreement or any understanding, any tacit understanding or anything else, between the City Commission or anyone else connected with the city and each of the two purchasers, defendants Ghioto and Hurley, nor that said sales were not bona fide in all respects.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter herein.

2. The defendant City of Jacksonville had the authority and right to close the two municipal golf courses and to sell the same, notwithstanding the permanent injunction entered in this cause on the 1st day of April, 1959. *Tonkins v. City of Greensboro* (1958) 162 F.Supp. 549, 276 F.2d 890; *Hampton, et al v. City of Jacksonville*, supra.

3. That the possibility of reverter retained by the city on both golf courses did not make the two golf courses publicly owned or operated golf courses and did not give the defendant City of Jacksonville control over the operation of the golf courses which would amount to "state action" within the purview of the Fourteenth Amendment to the Constitution. *Eaton v. Board of Managers of the James Walker Memorial Hospital* (1958) 164 F.Supp. 191, affirmed 261 F.2d 521, certiorari denied 79 S.Ct. 941, 359 U. S. 984, 3 L.Ed. 2d 934.

4. That no collusion, illegality, fraud or clear abuse of discretion has been shown to exist with respect to the sale of the two municipal golf courses and each of such sales, to-wit: the Hyde Park Golf Course to Fred A. Ghioto and the Brentwood Golf Course to Roland Hurley, was bona fide.

5. That the defendants, Hurley and Ghioto, as owners of said respective golf courses, as long as they do not violate the reverter clause in

their deeds or violate the covenants of their mortgages, have a right to the undisturbed possession and the right of use of their respective golf courses in such way as in their own business judgment each considers best to operate.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is by the Court.

CONSIDERED, ORDERED, ADJUDGED AND DECREED that defendants' motion to dismiss the petition to modify the final decree entered herein on April 1, 1959, made pursuant to Rule 41 (b) Federal Rules of Civil Procedure on the ground that upon the facts and the law the plaintiffs have shown no right to relief, be and the same is hereby granted and said petition to modify said final decree filed herein by the plaintiffs be and the same is hereby dismissed on the merits.

DONE AND ORDERED at Jacksonville, Florida, within said District, this 22nd day of June, 1961.

PUBLIC ACCOMMODATIONS
Trespass—Maryland

William L. GRIFFIN, et al. v. STATE OF MARYLAND.

Court of Appeals of Maryland, June 8, 1961, No. 248,_____A.2d._____.

SUMMARY: Two groups of individuals were convicted in Maryland circuit court of "wanton trespass" committed in connection with demonstrations against the segregation policies of a privately-owned amusement park. One group had been arrested in the amusement park itself after being asked to leave by a guard employed by the park, who was also a special deputy sheriff. The second group had been arrested in a nearby restaurant after being asked to leave by the same guard, who had had authority so to act under a prior agreement of 1957 between the park and the restaurant. The first group had sought injunctive relief against their arrest in a federal district court, but that court postponed action in the case "until after the disposition of the criminal charges." 5 Race Rel. L. Rep. 825 (1960).

The Maryland Court of Appeals affirmed the conviction of the first group, holding their trespass "wanton" in that they knowingly violated the property rights of another, and rejecting the contention that the action of the "special deputy" was state action violative of the Fourteenth Amendment. The conviction of the second group was reversed, the court holding that they were not properly notified to leave, either because the authority vested in the guard by the 1957 agreement was not effective in 1960, or because these defendants had no notice that the guard was an agent of the restaurateur, such notice being required by the state statute.

HORNEY, J.

This is a consolidated appeal from ten judgments and sentences to pay fines of one hundred dollars each, entered by the Circuit Court for Montgomery County after separate trials, each involving five defendants, on warrants issued for wanton trespass upon private property in violation of Code (1957), Art. 27, § 577.

The first group of defendants, William L. Griffin, Marvous Saunders, Michael Proctor, Cecil T. Washington, Jr., and Gwendolyn Greene (hereinafter called "the Griffin appellants" or "the Griffins"), all of whom are Negroes, were arrested and charged with criminal trespass on June 30, 1960, on property owned by Rekab, Inc., and operated by Kebar, Inc., as the Glen Echo Amusement Park (Glen Echo or park). The second group of defendants, Cornelia A. Greene, Helene D. Wilson, Martin A. Schain, Ronyl J. Stewart and Janet A. Lewis (hereinafter called "the Greene appellants" or

"the Greenes"), two of whom are Caucasians, were arrested on July 2, 1960, also in Glen Echo, and were also charged with criminal trespass.

The Griffins were a part of a group of thirty-five to forty young colored students who gathered at the entrance to Glen Echo to protest "the segregation policy that we thought might exist out there." The students were equipped with signs indicating their disapproval of the admission policy of the park operator, and a picket line was formed to further implement the protest. After about an hour of picketing, the five Griffins left the larger group, entered the park and crossed over it to the carrousel. These appellants had tickets (previously purchased for them by a white person) which the park attendant refused to honor. At the time of this incident, Rekab and Kebar had a "protection" contract with the National Detective Agency (agency), one of whose employees, Lt. Francis J. Collins (park officer), who is also a special deputy sheriff for Montgomery County, told the Griffins that they were not welcome in the park and asked them to leave. They refused, and after an interval during which the park officer conferred with Leonard Woronoff (park manager), the appellants were advised by the park officer that they were under arrest. They were taken to an office on the park grounds and then to Bethesda, where the trespass warrants were sworn out. At the time the arrests were made, the park officer had on the uniform of the agency, and he testified that he arrested the appellants under the established policy of Kebar of not allowing Negroes in the park. There was no testimony to indicate that any of the Griffins were disorderly in any manner, and it seems to be conceded that the park officer gave them ample time to heed the warning to leave the park had they wanted to do so.

The Greene appellants entered the park three days after the first incident and crossed over it and into a restaurant operated by the B & B Industrial Catering Service, Inc., under an agreement between Kebar and B & B. These appellants asked for service at the counter, were refused, and were advised by the park officer that they were not welcome and were ordered to leave. They refused to comply by turning their backs on him and he placed them under arrest for trespassing. Abram Baker (president of both Rekab and Kebar) testified that it was the policy of the park owner and operator to exclude Negroes and that the park officer had been instructed to ask Negro customers to leave, and that if they did not, the officer had orders to arrest them. There was no evidence to show that the operator of the restaurant had told the Greenes they were not welcome or to leave; nor was there any evidence that the park officer was an agent of the restaurant operator. And while a prior formal agreement[1] covering the 1957 and 1958 seasons had provided that the restaurant operator was subject to and should comply with the rules and regulations concerning the persons to be admitted to the park and that Kebar had reserved the right to enforce them, the letter confirming the agreement for the 1959 and 1960 seasons fixed the rentals for that period and alluded to other matters, but made no reference whatsoever, either directly or indirectly, to the prior formal agreement—though there was testimony, admitted over objection, to the effect that the letter was intended as a renewal of the prior lease—and was silent as to a reservation by Kebar of the right to police the restaurant premises during the 1959 and 1960 seasons.

On this set of facts, both groups of appellants make the same contentions on this appeal: (i) that the requirements for conviction under Art. 27, § 577, were not met; and (ii) that the arrest and conviction of the appellants constituted an exercise of the power of the State of Maryland in enforcing a policy of racial segregation in violation of the Fourteenth Amendment to the Constitution of the United States.

Trespass to private property is not a crime at common law unless it is accompanied by, or tends to create, a breach of the peace. See *Krauss vs. State*, 216 Md. 369, 140 A. 2d 653 (1958), and the authorities therein cited. And it was not until the enactment of § 21A of Art. 27 (as a part of the Code of 1888) by Chapter 66 of the Acts of 1900 that a "wilful trespass" (see *House Journal* for 1900, p. 322) upon private property was made a misdemeanor. That statute, which has remained unchanged in phraseology since it was originally enacted, is now § 577 of Art. 27 (in the Code of 1957), entitled "wanton trespass upon private land," and reads in pertinent part:

(1) The document was called an "agreement"; the operator of the restaurant was referred to therein as a "concessionaire" and was described in the agreement as a "licensee" and not a "lessee"; yet the agreement called for the payment of rent (payable bi-annually) as well as a portion of the gross receipts and a part of the county licensing fees and certain other items of expense.

"Any person * * * who shall enter upon or cross over the land, premises or private property of any person * * * after having been duly notified by the owner or his agent not to do so shall be deemed guilty of a misdemeanor * * *; provided [however] that nothing in this section shall be construed to include * * * the entry upon or crossing over any land when such entry or crossing is done under a bona fide claim of right or ownership * * *, it being the intention of this section only to prohibit any wanton trespass upon the private land of others."

The Case Against The Griffin Appellants

(i)

The claim that the requirements for conviction were not met is threefold: (a) that due notice not to enter upon or cross over the land in question was not given to the appellants by the owner or its agent; (b) that the action of the appellants in doing what they did was not wanton within the meaning of the statute; and (c) that what the appellants did was done under a bona fide claim of right.

There was due notice so far as the Griffins were concerned. Since there was evidence that these appellants had gathered at the entrance of Glen Echo to protest the segregation policy they thought existed there, it would not be unreasonable to infer that they had received actual notice not to trespass on the park premises even though it had not been given by the operator of the park or its agent. But, even if we assume that the Griffins had not previously had the notice contemplated by the statute which was required to make their entry and crossing unlawful, the record is clear that after they had seated themselves on the carrousel, these appellants were not only told they were unwelcome, but were then and there clearly notified by the agent of the operator of the park to leave and deliberately chose to stay. That notice was *due* notice to these appellants to depart from the park premises forthwith and their refusal to do so when requested constituted an unlawful trespass under the statute. Having been duly notified to leave, these appellants had no right to remain on the premises and their refusal to withdraw was a clear violation of the statute under the circumstances even though the original entry and crossing over the premises had not been unlawful. *State vs. Fox*, 118 S.E. 2d 58 (N.C. 1961). Cf. *Commonwealth vs. Richardson*, 48 N.E. 2d 678 (Mass 1943). Words such as "enter upon" or "cross over" as used in § 577, *supra*, have been held to be synonymous with the word "trespass." See *State vs. Avent*, 118 S.E. 2d 47 (N.C. 1961).

The trespass was wanton within the meaning of the statute. Since the evidence supports a reasonable inference that the Griffins entered the park premises and crossed over it well knowing that they were violating the property rights of another, their conduct in so doing was clearly wanton. Although there are almost as many legal definitions of the word "wanton" as there are appellate courts, we think the Maryland definition, which is in line with the general definition of the word in other jurisdictions, is as good as any. In *Dennis vs. Baltimore Transit Co.*, 189 Md. 610, 56 A. 2d 813 (1948), as well as in *Baltimore Transit Co. vs. Faulkner*, 179 Md. 598, 20 A. 2d 485 (1941), it was said that the word "wanton" means "characterized by extreme recklessness and utter disregard for the rights of others." We see no reason why the refusal of these appellants to leave the premises after having been requested to do so was not wanton in that their conduct was in "utter disregard for the rights of others." Even though their remaining may have been no more than an aggravating incident, it was nevertheless wanton within the meaning of this criminal trespass statute. See *Ex Parte Birmingham Realty Co.*, 63 So. 67 (Ala. 1913).

Since it was admitted that the carrousel tickets were obtained surreptitiously in an attempt to "integrate" the amusement park, we think the claim that these appellants had taken seats on the carrousel under a bona fide claim of right is without merit. While the statute specifically excludes the "entry upon or crossing over" privately owned property by a person having a license or permission to do so, these appellants do not come within the statutory exception. In a case such as this where the operator of the amusement park—who had a right to contract only with those persons it chose to deal with—had not knowingly sold carrousel tickets to these appellants, it is apparent that they had no bona fide claim of right to a ride thereon, and, absent a valid right, the refusal to accept the tickets was not a violation of any legal right of these appellants.

(ii)

We come now to the consideration of the second contention of the Griffin appellants that their arrest and conviction constituted an unconstitutional exercise of state power to enforce racial segregation. We do not agree. It is true, of course, that the park officer—in addition to being an employee of the detective agency then under contract to protect and enforce, among other things, the lawful racial segregation policy of the operator of the amusement park—was also a special deputy sheriff, but that dual capacity did not alter his status as an agent or employee of the operator of the park. As a special deputy sheriff, though he was appointed by the county sheriff on the application of the operator of the park "for duty in connection with the property" of such operator, he was paid wholly by the person on whose account the appointment was made and his power and authority as a special deputy was limited to the area of the amusement park. See Montgomery County Code (1955), § 2-91. As we see it, our decision in *Drews vs. State*, 224 Md. 186, 167 A. 2d 341 (1961), is controlling here. The appellants in that case—in the course of participating in a protest against the racial segregation policy of the owner of an amusement park—were arrested for disorderly conduct committed in the presence of regular Baltimore County police who had been called to eject them from the park. Under similar circumstances, the appellants in this case—in the progress of an invasion of another amusement park as a protest against the lawful segregation policy of the operator of the park—were arrested for criminal trespass committed in the presence of a special deputy sheriff of Montgomery County (who was also the agent of the park operator) after they had been duly notified to leave but refused to do so. It follows—since the offense for which these appellants were arrested was a misdemeanor committed in the presence of the park officer who had a right to arrest them, either in his private capacity as an agent or employee of the operator of the park or in his limited capacity as a special deputy sheriff in the amusement park (see Kauffman, *The Law of Arrest in Maryland*, 5 Md. L. Rev. 125, 149)—the arrest of these appellants for a criminal trespass in this manner was no more than if a regular police officer had been called upon to make the arrest for a crime committed in his presence, as was done in the *Drews* case. As we see it, the arrest and conviction of these appellants for a criminal trespass as a result of the enforcement by the operator of the park of its lawful policy of segregation, did not constitute such action as may fairly be said to be that of the State. The action in this case, as in *Drews*, was also "one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants."

The judgment as to the Griffin appellants will be affirmed.

The Case Against The Greene Appellants

There is not enough in the record to show that the Greenes were duly notified to leave the restaurant by the only persons who were authorized by the statute to give notice. The record discloses that these appellants entered the park and crossed over it into the restaurant on the premises, but there was no evidence that the operator or lessee of the restaurant or an agent of his either advised these appellants that they were unwelcome or warned them to leave. There was evidence that the park officer had ordered these appellants to leave, but it is not shown that he was authorized to do so by the lessee, and a new written agreement for the 1959 and 1960 seasons having been substituted for the former agreement covering the 1957 and 1958 seasons, the state of the record is such that it is not clear that the lessor had reserved the right to continue policing the leased premises as had been the case during the 1957-1958 period. Under these circumstances, it appears that the notice given by the park officer was ineffective. There is little doubt that these appellants must have known of the racial segregation policy of the operator of the park and that they were not welcome anywhere therein, but where notice for a definite purpose is required, as was the case here, knowledge is not an acceptable notice where the required notification is incident to the infliction of a criminal penalty. 1 Merrill, *Notice*, § 509. See also *Woodruff vs. State*, 54 So. 240 (Ala. 1911), where it was held (at p. 240) that "[i]n order to constitute the offense of trespass after warning, it is necessary to show that the warning was given by the person in possession or his duly authorized agent." And see *Payne vs. State*, 12 S.W.2d 528 (Tenn. 1928), [a court cannot convict a person of a crime upon notice different from that expressly

provided in the statute]. Since the notice to the Greene appellants was inadequate they should not have been convicted of trespassing on private property, and the judgments as to them must be reversed.

The judgments against the Griffin appellants are affirmed; the judgments against the Greene appellants are reversed; the Griffin appellants shall pay one-half of the costs; and Montgomery County shall pay the other one-half.

TRIAL PROCEDURE
Summary Dismissal—Federal Courts

Theodore X. A. SEWELL, et al. v. Paul F. PEGELOW, etc., et al.

United States Court of Appeals, Fourth Circuit, May 31, 1961, 291 F.2d 196.

[See 6 Race Rel. L. Rep. 770, supra].

LEGISLATURES

ANTI-DISCRIMINATION

Public & Private Accommodations, Employment, Sales—Virgin Islands

Act No. 710 of the 1961 session of the legislature of the Virgin Islands, approved on June 9, 1961, broadly prohibits discrimination, on the basis of race, creed, color or national origin, in all places of public accommodation, resort or amusement, in the sale of land, goods or services, in employment, and in private clubs.

AN ACT To Amend and Revise Title 10 of the Virgin Islands Code Relating to Civil Rights.

Be it enacted by the Legislature of the Virgin Islands:

Section 1. Title 10 of the Virgin Islands Code, relating to Civil Rights is hereby amended and revised to read as follows:

Title 10—CIVIL RIGHTS ACT

Chapter 1. Equal Rights of All Persons Against Discrimination

SECTION ANALYSIS

§ 1. Statement of public policy

Whereas this Title 10 is enacted under the police power of the Territory of the Virgin Islands, for the protection of the public welfare, order, health, safety, and peace of all of the people therein; and

Whereas the Legislature finds and hereby declares that practices of racial discrimination against any of the inhabitants of the Virgin Islands because of race, creed, color, or national origin not only threatens the rights and proper privileges of its inhabitants but menaces and threatens the foundations of a free and democratic territory and menaces and threatens the peace, order, health, safety, and general welfare of its inhabitants; and

Whereas it is the cultural and democratic heritage of the people of the Virgin Islands to respect the human and civil rights of all people and to judge all persons according to their individual merit without reference to race, creed, color, or national origin; and to cherish the racial equality, harmony, and good will that exists in the Virgin Islands; and

Whereas racial discrimination, segregation, and other forms of bias and bigotry are not part of the way of life of the people of the Virgin Islands:

Now, therefore, It is declared to be the public policy of the Virgin Islands that all natural persons within its jurisdiction shall be entitled to the full and equal accommodations, advantages, facilities, and privileges of any place of public accommodations, resort, or amusement, and to the equal opportunity and treatment in employment in any and all businesses and industrial establishments, and to membership in all labor organizations, and to equal privileges in the purchase, lease, or rental of real estate, and in the purchase of any commodity or service offered for sale; subject only to conditions or limitations imposed by law and applicable in like manner to all persons.

In order to implement this public policy, it is

the intent of this Act to prevent and prohibit discrimination in any form based upon race, creed, color, or national origin, whether practiced directly or indirectly, or by subterfuge in any and all places of public accommodations, resort, or amusement, and in all sales of real estate, goods, articles, accommodations, commodities, or services, and in the employment of persons, or their working conditions, or obtaining union membership, and to prohibit clubs from establishing a private clientele of either members or guests, which they have selected, and with which persons alone will they transact their business and commerce.

§ 2. Definitions

As used in this Act—

"discrimination" includes refusal of sale or service, employment, or of setting up different standards in any of these, or segregation, based on race, creed, color, or national origin.

"place of public accommodation, resort, or amusement" means any place where food or drink is sold, or rooms rented, or charge is made for admission or service, or occupancy or use of any property or facilities, including but not limited to inns, hotels (whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation, or rest), taverns, road houses, rooming houses, restaurants, eating houses, or any places where food is sold for consumption on the premises, buffets, saloons, barrooms, parks or enclosures where food, spirituous or malt liquors, wines, soft drinks or beer are sold; bathing houses, beaches, swimming pools, barber shops, beauty parlors, soda fountains, drink parlors of all kinds, shops, stores, gardens, amusement and recreation parks, theaters, golf courses, public and private schools, clubs (if food, drink or other commodities are sold there), public conveyances operated on land or water or in the air as well as the stations or terminals thereof, or any hospital, sanitarium, dispensary, or clinic.

"club" means any association of individuals banded together by their free accord for any lawful purpose. The provisions of this Act shall not bar any club organized and operated exclusively for pleasure, recreation or other noncommercial purposes, which is supported by or derives its funds entirely from dues and contributions from its membership. This Act does not prohibit such lawful private clubs; it does not regulate their free selection of club membership; and does not restrict their freedoms of choice or association. This Act does, however, prohibit such clubs, along with all other persons, from selling, leasing, or renting real estate, and from entering the field of business and commerce by selling food or drink or any other commodity or charging for the use of any beach or other club facility or service, or from using the license issued to them to do so, on any discriminatory basis whatsoever.

Whenever or wherever a club sells any of the commodities or services mentioned in this Act either to its membership or its guests selected by itself, it is hereby declared to have entered the field of business and commerce, and, therefore to be a place of public accommodation under the meaning of this Act.

§ 3. Rights of persons; prohibition against discrimination

(a) All natural persons within the jurisdiction of the Virgin Islands, without regard to race, creed, color, or national origin, and subject only to the conditions and limitations established by law and applicable in like manner to all persons, are entitled to—

(1) equal treatment with respect to employment, pay and working conditions in any and all businesses and industry, and with respect to union membership.

(2) the full and equal accommodations, advantages, facilities, and privileges of any place of public accommodation, resort, or amusement.

(3) the full and equal privilege to purchase or rent any item of real estate, goods, commodities, service or any other thing offered for charge to others.

(b) No person, being the owner, proprietor, superintendent, manager, agent, or employee of any publicly licensed business or any other business or industrial establishment, shall directly, indirectly or by subterfuge, deny employment in or at such business to any applicant therefor, or engage in or permit any discrimination or differential in pay or working conditions for workers doing the same work, on account of race, creed, color, or national origin, subject only to the conditions and limitations established by law and applicable in like manner to all persons.

(c) No person being an officer, agent or employee of a labor organization shall directly, indirectly or by subterfuge deny membership in such organization to any applicant therefor, on

account of race, creed, or color, or national origin, subject only to the conditions and limitations established by law and applicable in like manner to all persons.

(d) No person, being the owner, proprietor, lessee, superintendent, agent, or employee of any place of public accommodation, resort or amusement, shall directly or indirectly or by subterfuge—

(1) withhold from or deny to any other person any of the accommodations, advantages, facilities, or privileges thereof; or

(2) adopt or pursue any custom, policy, practice, requirement or secret understanding, or any custom or policy of nonmembership discrimination or guest-card requirement with respect to the operation or management of such place which is intended, calculated or designed to, or which shall have the effect of discriminating against any other persons on account of race, creed, color, or national origin, or by reason of nonmembership in a club.

(e) No person, being an officer, owner, proprietor, manager, superintendent, lessee, agent or employee of any business or club, engaged in selling, leasing or renting any plot of land, building sites, lots, estates, houses, apartments, or any other item of real estate shall, directly, indirectly or by subterfuge, deny to any other person the right to purchase, lease or rent any such item of real estate, on account of race, creed, color, or national origin, subject only to the conditions and limitations established by law, and applicable in like manner to all persons.

(f) Any restrictive covenant or condition or other provision in a deed, contract or writing of whatsoever nature relating to the conveyance, sale, lease or rental, of real estate, or any interest therein, which in any manner prohibits or restricts the reconveyance or resale, ownership, use or enjoyment of such real estate or interest therein on account of race, creed, color, or national origin, is contrary to public policy and hereby declared null and void and of no effect whatsoever. Likewise any covenant, condition, or provision in such deed, contract or writing requiring resale back to the seller or to some other particular person, corporation or group or any other special option on the part of the seller, except in family relationship and government homestead deeds, is hereby declared to be subterfuge and also void and of no force whatsoever.

(g) The use of any roadway or street into, within or through any subdivision of residential development of ten or more dwellings, which roadway or street is open to the use of any other persons as guests, visitors or permittees, other than the actual inhabitants thereof, shall not be denied or restricted directly, indirectly or by subterfuge, to any person on account of race, creed, color, or national origin, subject only to the conditions and limitations established by law and applicable in like manner to all persons.

§ 4. Filing information as to club facilities, license, charges, etc.; determination and registration

(a) No later than January 15 of each year, any person maintaining, owning, leasing, possessing, or operating any club facilities consisting of physical property such as land, beaches, or buildings shall file with the Government Secretary—

(1) a statement of the licenses he holds to sell liquor, food or drink, or to rent rooms, or to charge for any other use or occupancy of property, facility, service or beach, together with a statement of what articles, if any, are sold, what rooms, if any, are rented, and what other facilities or services are maintained for charge; and

(2) if an incorporated or unincorporated association of individuals, a copy of its constitution and bylaws, together with a list of all duly elected officers and directors and a list of all members of the association—

all of which must be certified upon oath.

(b) If any charges, as described in subsection (a) of this section, are made either to members or nonmembers of clubs, the statement required by such subsection shall also include an affidavit by the president and manager of the club in each such case, certifying that there is no discrimination in such sales, renting, or use based upon race, creed, color, national origin or nonmembership in the club.

(c) Any place at or on which charges are made in any manner for any article, or for the use or occupancy of any property, facility or service located or operated thereon is expressly declared to be a place of public accommodation, resort or amusement within the spirit and meaning of this Act, and shall, upon determination as such by the Government Secretary or the District Court of the Virgin Islands, be so registered in the office of the Government Secretary.

§ 5. Tuition charges by parochial or denominational schools; admission to religious bodies maintaining schools

This Act shall not be construed as preventing a reasonable difference in charges by parochial or denominational schools for tuition of members and nonmembers or preference in admission to members of the religious body maintaining the school.

§ 6. Enforcement by Commissioner of Public Safety

The Commissioner of Public Safety shall name a panel of police officers, selected for their tact and intelligence, who shall be authorized to make periodical inspections, at reasonable times of all places holding any licenses whatsoever, or other business establishments selling any article whatsoever as covered in this Act, or upon reasonable cause to investigate any club in order to see that the provisions of this Act are complied with. The Commissioner shall be responsible for making said inspections either personally or by members of the panel which he has set up. Such inspections shall be made at intervals of not less than 60 days. The inspecting officer or officers shall file with the Commissioner a written report on the findings of each inspection. These reports shall form a permanent record in the office of the Commissioner of Public Safety. Any violations revealed by said reports shall be immediately referred to the office of the Attorney General.

§ 7. Penalties for violations

Whoever, whether as owner, officer, manager, agent, or employee of any business or industrial establishment, labor organization, place of public accommodation, resort or amusement, or club, violates any of the provisions of this Act, shall, for each and every such violation, be—

(1) liable in actual damages, and in addition, thereto, to punitive damages not to exceed $5,000 to be recovered in a civil action by the person aggrieved thereby or by any resident of the Virgin Islands to whom the person aggrieved may assign his cause of action; and

(2) fined not more than $2,000 or imprisonment [imprisoned] not more than six months, or both.

(3) the owner or owners of any business where an offense mentioned herein has been committed by his or its officer, manager, agent, or employee, such owner or owners shall be severally and/or jointly liable with the offender for the actual and punitive damages provided for herein.

(4) each day of violation shall constitute a separate offense.

(5) neither penalty nor action listed above, in subsections (1) and (2) of this section, shall be a bar to the other, and recovery or action in one shall not preclude action or recovery in the other or in any other lawful remedy otherwise possessed by an aggrieved person.

(6) any person who conspires with another person to violate any of the provisions of this Act shall be liable as a principal violator and subject to all of the penalties above.

§ 8. Revocation of license by District Court; procedure

Whenever the Attorney General of the Virgin Islands has information that any person engages in any act, or adopts or pursues any custom, policy, practice, or requirement amounting in effect to violation or evasion of this Act, he shall procure a rule to show cause to issue out of the District Court of the Virgin Islands requiring such person to show cause before such Court why his license to do business should not be revoked because of an act or acts committed against public policy.

If the Court finds that such person has violated or is violating any of the provisions of this Act, it shall order his license revoked or suspended because of an act or acts committed against public policy.

§ 9. Revocation of license or tax exemption by Governor

In addition to any other penalties provided for in this Act, the license to conduct a business, or to sell any articles or facilities or services, or any tax or fee exemption or subsidy granted under the provisions of Title 33, V.I.C., Subtitle 4, of any person who violates any of the provisions of this Act in connection with such business, sale of articles or facilities or services may, in the discretion of the Governor, after adequate notice and hearing, be revoked, suspended or its renewal denied.

§ 10. Construction of Act

The courts shall construe this Act liberally in furtherance of its intent as stated in section 1 of this title.

Section 2. This Act shall become effective immediately upon approval.

COMMISSIONS
Enforcement Powers—Massachusetts

Chapter 570 of the 1961 Acts of the Massachusetts legislature, approved by the governor on May 29, 1961, amends that state's anti-discrimination statute [as last amended, 2 Race Rel. L. Rep. 1155 (1957)] to allow members of the Commission Against Discrimination to seek injunctive relief against persons accused of violating the Act.

AN ACT authorizing a commissioner of the Massachusetts Commission Against Discrimination to seek injunctive relief against persons accused of unlawful discrimination.

Be it enacted, etc., as follows:

The second paragraph of section 5 of chapter 151B of the General Laws, as most recently amended by section 4 of chapter 426 of the acts of 1957, is hereby further amended by inserting after the fourth sentence the following three sentences:—After a determination of probable cause hereunder such commissioner may also file a petition in equity in the superior court in any county in which the unlawful practice which is the subject of the complaint occurs, or in a county in which a respondent resides or transacts business, or in Sufolk county, seeking appropriate injunctive relief against such respondent, including orders or decrees restraining and enjoining him from selling, renting or otherwise making unavailable to the complainant any housing accommodations with respect to which the complaint is made, pending the final determination of proceedings under this chapter; provided, however, that no such injunctive relief, order or decree shall be granted except after hearing, notice of which shall be given to the respondent at least three days prior thereto by the commissioner by registered mail directed to the respondents' last and usual place of obode, together with a copy of such petition. An affidavit of such notice shall forthwith be filed in the clerk's office. The court shall have power to grant such temporary relief or restraining orders as it deems just and proper.

COMMISSIONS
Powers—New York City

Local Law No. 55 of 1955 of the New York City Council, amended to May 1, 1961, creates a Commission on Intergroup Relations for that city, defines the commission's functions, and specifies its powers and duties.

Be it enacted by the Council as follows:

Section 1. Chapter one of the administrative code of the city of New York is hereby amended by adding thereto a new title, to be title B, to read as follows:

TITLE B

Commission on Intergroup Relations

§ B1-1.0 Policy.—In the city of New York, with its great cosmopolitan population consisting of large numbers of people of every race, color, creed, national origin and ancestry, there is no greater danger to the health, morals, safety and welfare of the city, and its inhabitants than the existence of groups prejudiced against one another and antagonistic to each other because of differences of race, color, creed, national origin or ancestry. The council hereby finds and declares that prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of its inhabitants and menace the institutions and foundations of a free democratic state. A city agency is hereby created through which the city of New York officially may encourage and bring about mutual understanding and respect among all groups in the city, eliminate prejudice, intol-

erance, bigotry, discrimination and disorder occasioned thereby and give effect to the guarantee of equal rights for all assured by the constitution and the laws of this state and of the United States of America.

§ B1-2.0 Definitions. —As used in this title:

(1) "Discrimination" shall mean any difference in treatment based on race, creed, color, national origin or ancestry and shall include segregation, except that it shall not be discrimination for any religious or denominational institution to devote its facilities, exclusively or primarily, to or for members of its own religion or denomination or to give preference to such members or to make such selection as is calculated by such institution to promote the religious principles for which it is established or maintained.

(2) "Religious or denominational institution" shall mean an institution which is operated for religious purposes or is operated, supervised or controlled by a religious or denominational organization.

§ B1-3.0 Commission on intergroup relations.—There is hereby created a commission on intergroup relations. It shall consist of fifteen members, serving without compensation, to be appointed by the mayor, one of whom shall be designated by him as its chairman. Of the fifteen members first appointed, five shall be appointed for one year, five for two years and five for three years; thereafter all appointments to the commission shall be for a term of three years. In the event of the death or resignation of any member, his successor shall be appointed to serve for the unexpired period of the term for which such member had been appointed.

§ B1-4.0 Functions. —The functions of the commission shall be:

(1) To foster mutual understanding and respect among all racial, religious and ethnic groups in the city of New York;

(2) To encourage equality of treatment for, and prevent discrimination against, any racial, religious or ethnic group or its members;

(3) To cooperate with governmental and nongovernmental agencies and organizations having like or kindred functions; and

(4) To make such investigations and studies in the field of human relations as in the judgment of the commission will aid in effectuating its general purposes.

§ B1-5.0 Powers and duties.—The powers and duties of the commission shall be:

(1) To work together with federal, state and city agencies in developing courses of instruction, for presentation to city employees and in public and private schools, public libraries, museums and other suitable places, on techniques for achieving harmonious intergroup relations within the city of New York;

(2) To enlist the cooperation of the various racial, religious and ethnic groups, community organizations, labor organizations, fraternal and benevolent associations and other groups in New York city, in programs and campaigns devoted to eliminating group prejudice, intolerance, bigotry and discrimination:

(3) To study the problems of prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby in all or any fields of human relationship;

(4) To receive and investigate complaints and to initiate its own investigations of: (a) racial, religious and ethnic group tensions, prejudice, intolerance, bigotry and disorder occasioned thereby; (b) discrimination against any person, group of persons, organization or corporation, whether practiced by private persons, associations, corporations and, after consultation with the mayor, by city officials or city agencies, except that all instances of such discrimination, other than those involving the occupancy of housing accommodations, within the jurisdiction of the state commission against discrimination shall be referred to that commission and all instances of such discrimination within the jurisdiction of the administrator of the fair education practices law shall be referred to the said administrator.

(5) To hold hearings, compel the attendance of witnesses, administer oaths, take the testimony of any person under oath and in connection therewith to require the production of any evidence relating to any material under investigation or any question before the commission. No public hearing shall be held pursuant to this title without written approval of the mayor. The powers enumerated in this sub-section may be exercised by any group of three or more members of the commission when so authorized in writing by the commission, except that such power in hearings held under Title X of Chapter 41 of the administrative code of the city of New York may be exercised by two or more members of the commission when so authorized in writing

by the commission. The commission after the completion of any public hearing, shall make a report in writing to the mayor setting forth the facts found by it and its recommendations. At any hearing before the commission or any member or committee thereof a witness shall have the right to be advised by counsel present during such hearings.

(6) To issue publications and reports of investigations and research designed to promote good will and to minimize or eliminate prejudice, intolerance, bigotry, discrimination and disorder occasioned thereby;

(7) To appoint an executive director. The expenses for the carrying on of the commission's activities shall be paid out of the funds in the city treasury;

(8) To recommend to the mayor and to the city council legislation to aid in carrying out the purposes of this title;

(9). To submit an annual report to the mayor and the city council which shall be published in the City Record.

§ B1-6.0 Relations with city departments and agencies.—So far as practicable and subject to the approval of the mayor, the services of all other city departments and agencies shall be made available by their respective heads to the commission for the carrying out of the functions herein stated. The head of any department or agency shall furnish information in the possession of such department or agency when the commission, after consultation with the mayor, so requests. The corporation counsel may assign counsel to assist the commission in the conduct of its investigation or hearings.

§ 2. If any provision of this local law or the application of such provision to any person or circumstance shall be held invalid, the remainder of such local law or the application of such provision to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

§ 3. This local law shall take effect July first, nineteen hundred fifty-five.

EDUCATION
Schools—Pennsylvania

Act No. 341 of the 1961 Acts of the Pennsylvania legislature, approved by the governor on July 17, 1961, prohibits discrimination on the basis of race, religion, color, ancestry, or national origin in the acceptance of students by certain educational institutions of secondary and post-secondary grade. Denominational schools are exempted to the extent that each may select students from its own denomination.

AN ACT Declaring the policy of the Commonwealth with regard to discriminatory practices in educational institutions based upon race religion color ancestry or national origin prohibiting such discriminatory practices providing for procedure and enforcement providing for judicial review providing for administration by the Pennsylvania human relations Commission in the Department of Labor and Industry and defining its functions powers and duties hereunder

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows

Section 1. Short Title This act may be cited as the "Pennsylvania Fair Educational Opportunities Act"

Section 2. Findings and Declaration of Policy (a) It is hereby declared to be the policy of this Commonwealth that all persons shall have equal opportunities for education regardless of their race religion color ancestry or national origin

(b) Equality of educational opportunities requires that students otherwise qualified be admitted to educational institutions without regard to race religion color ancestry or national origin

(c) It is recognized that there is a fundamental American right for members of various religious faiths to establish and maintain educational institutions exclusively or primarily for

students of their own religious faith. In such institutions students otherwise qualified should have equal opportunity to attend therein without discrimination because of race color ancestry or national origin

(d) This act shall be deemed an exercise of the police power of the Commonwealth for the protection of the public welfare prosperity health and peace of the people of the Commonwealth of Pennsylvania

Section 3. Definitions As used in this act

(1) "Educational institution" means any institution of post-secondary grade and any secretarial business vocational or trade school of secondary or post-secondary grade which is subject to the visitation examination or inspection of or is or may be licensed by the Department of Public Instruction including any post secondary school college or university incorporated or chartered under any general law or special act of the General Assembly except any religious or denominational educational institution as defined in this act

(2) "Religious or denominational educational institution" means an educational institution which is operated supervised controlled or sustained primarily by a religious or denominational organization or is one which is stated by the parent church body to be and is in fact officially related to that church by being represented on the board of the institution and by providing substantial financial assistance and which has certified in writing to the commission that it is a religious or denominational educational institution

(3) "Discriminate" includes "segregate"

(4) "Commission" means the Pennsylvania human relations Commission in the Department of Labor and Industry

(5) "Student" means a person seeking admission to or in attendance at a school or educational institution as the case may be

(6) "Person" includes one or more individuals partnerships associations organizations or corporations

Section 4. Unfair Educational Practices (a) It shall be an unfair educational practice for an educational institution

(1) To exclude or limit or otherwise discriminate because of race religion color ancestry or national origin against any student or students seeking admission as students to such institutions Provided That it shall not be unfair educational practice for any educational institution to use criteria other than race religion color ancestry or national origin in the admission of students

(2) To make any written or oral inquiry prior to admission concerning or designed to elicit information as to the race religion color ancestry or national origin of a student seeking admission to such institution

(3) To expel suspend punish deny facilities or otherwise discriminate against any student because of race religion color ancestry or national origin

(4) To penalize or discriminate against any individual because he has initiated testified participated or assisted in any proceedings under this act

(5) To fail to preserve for a period of three years any records documents and data dealing with or pertaining to the admission rejection expulsion or suspension of students or to refuse to make such records documents and data available at all times for the inspection of the commission

(b) It shall be an unfair educational practice for any person to aid abet incite compel or coerce the doing of any act declared by this section to be an unlawful educational practice or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder or to attempt directly or indirectly to commit any act declared by this section to be an unlawful educational practice

(c) Nothing in this section shall be deemed to affect in any way the right of religious or denominational educational institutions to select its students exclusively or primarily from members of such religion or denomination or from giving preference in such selection to such members

(d) Nothing in This Section Shall Prohibit Any Educational Institution from Accepting and Administering any Inter-Vivos or Testamentary Gift Upon Such Terms and Conditions As May Be Prescribed by the Donor

Section 5. Administration The Pennsylvania Human Relations Commission created by the Act of October 27 1955 (P L 744) as amended by the act of February 28 1961 (Act No 19) known as the "Pennsylvania Human Relations Act" is hereby vested with authority to administer this act

Section 6. Powers and Duties of the Commission Without in anywise detracting from or in

derogation or diminution of the duties of the commission as set forth in the act of October 27 1955 (P L 744) known as the "Pennsylvania Human Relations Act" said commission is hereby vested with the following powers and duties

(1) To make visits when deemed advisable to each of the educational institutions except religious or denominational institutions within the Commonwealth for the purpose of examining and studying the procedures and practices used in the selection of students

(2) To make studies of the various forms and uses of transcript of record employed by educational institutions except religious or denominational institutions and of the standards procedures practices and criteria used by same with respect to recommending and approving students for further education in said educational institutions

(3) To make whatever studies may be necessary to aid it in carrying out its functions including studies to determine factually the total number of students applying each year to educational institutions except religious or denominational institutions within the Commonwealth the number of them finally accepted and the basic factors which determine whether an applicant will be accepted or rejected by such institutions

(4) To formulate recommend and carry out a comprehensive program designed to eliminate and prevent prejudice and discrimination in educational institutions except religious or denominational institutions based upon race religion color ancestry or national origin

(5) To formulate policies to carry out the purposes of this act and to make recommendations to any or all of the educational institutions included under the provisions of this act to effectuate such policies

(6) To adopt amend modify or rescind such rules and regulations as may be necessary to carry out the functions of the commission and to effectuate the purposes and provisions of this act

(7) To initiate receive and investigate and seek to adjust all complaints of unfair educational practices forbidden by this act

(8) Whenever the commission in its sole discretion determines that informal methods of conference conciliation and persuasion have failed to induce the elimination of unfair educational practices to hold hearings subpoena witnesses administer oaths or affirmations take the testimony of any person under oath or affirmation and require the production for examination of any books or papers relating to any matter under investigation or any question properly before the commission

(9) To issue orders requiring any educational institution of the Commonwealth included under the provisions of this act to cease and desist from any unfair educational practice and to secure enforcement of the order of the commission or other appropriate relief by either the Court of Common Pleas of Dauphine County or by the court of common pleas of the county within which the educational institution is located

(10) From time to time but not less than once a year to render to the Governor and Legislature a written report of its activities and recommendation

Section 7. Procedure Any aggrieved person or anyone representing the aggrieved person may make sign and file with the commission a verified complaint within six months after an unfair educational practice is alleged to have been committed which shall set forth the particulars thereof and contain such other information as may be required by the commission The commission upon its own initiative or the Attorney General may in like manner make sign and file such complaint

The procedure for the processing of any complaint shall be in accordance with the provisions of the act of April 9 1929 (P L 177) known as "The Administrative Code of 1929" with the rules and regulations promulgated by the commission

Until the commission shall determine that a cease and desist order shall be issued It shall not disclose what takes place during informal efforts at persuasion conciliation or mediation nor shall it offer in evidence in any proceedings the facts adduced in such informal efforts nor shall publicity be given to any proceedings before the commission and the identity of the educational institution shall not be disclosed except in cases of public hearings Provided that the commission may publish the terms of conciliation when a complaint has been adjusted and the results of surveys or studies conducted by the commission which pertain to matters of race religion color ancestry or national origin

Section 8. Judicial Review Any order of the commission may be reviewed and any order of court may be appealed under the provisions of

the act of June 4 1945 (P L 1388) known as the "Administrative Agency Law" and its amendments

Section 9. Construction The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof and any law inconsistent with any provisions hereof shall not apply Nothing contained in this act shall be deemed to repeal any of the provisions of any law of this Commonwealth relating to discrimination because of race religion color ancestry or national origin

Section 10. Separability If any clause sentence paragraph or part of this act or the application thereof to any person or circumstance shall for any reason be adjudged by a court of competent jurisdiction to be invalid such judgment shall not affect impair or invalidate the remainder of this act nor the application of such clause sentence paragraph or part to other persons or circumstances but shall be confined in its operation to the clause sentence paragraph or part thereof and to the persons or circumstances directly involved in the controversy in which such judgment shall have been rendered It is hereby declared to be the legislative intent that this act would have been adopted had such provisions not been included or such persons or circumstances been expressly excluded from their coverage

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EMPLOYMENT
Fair Employment Practices—Illinois

Senate Bill 609 of the 1961 Acts of the Illinois legislature, approved by the governor on July 21, 1961, declares a state policy against discrimination in employment practices, sets up a Fair Employment Practices Commission and defines the functions and powers of the commission. Discriminatory membership rules of labor organizations are also prohibited.

An Act to promote the public health, welfare and safety of the People of the State of Illinois by reducing denial of equality of employment opportunity because of race, color, religion, national origin or ancestry; to create a Fair Employment Practices Commission, to define its functions, powers and duties, to provide for enforcement of its orders, and to make an appropriation in connection therewith.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. Declaration of Policy.) Whereas denial of equal employment opportunity because of race, color, religion, national origin or ancestry with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies resulting in grave injury to the public safety, health and welfare:

Therefore, it is declared to be the public policy of this State that without in any way precluding any employer from selecting between persons of equal merit, ability, and capabilities, equal employment opportunity or apprenticeship opportunity without discrimination because of race, color, religion, national origin or ancestry should be protected by State law.

It is also the public policy of this State to protect employers, labor organizations and employment agencies from unfounded charges of discrimination.

Section 2. Definitions.) When used in this Act, unless the context otherwise requires, the term:

(a) "Commission" means the Fair Employment Practices Commission created by this Act.

(b) "Complainant" means any individual charging on his own behalf to have been personally aggrieved by an unfair employment practice.

(c) "Employee" includes and means any individual performing services for remuneration

within this State for an employer, or who is an apprentice, or who is an applicant for any apprenticeship; except that the term "employee" does not include domestic servants in private homes, individuals employed by persons who are not employers as defined by this Act, or persons employed in "agricultural labor" as that term is defined in The Unemployment Compensation Act, as now or hereafter amended.

(d) "Employer" includes and means all persons, including any labor organization, labor union, or labor association employing more than 100 persons within the State within each of 20 or more calendar weeks, within either the current or preceding calendar year prior to January 1, 1963; or so employing 75 or more persons after December 31, 1962 and prior to January 1, 1965; or so employing 50 or more persons after December 31, 1964; except that the term "employer" does not include any not for profit corporation or association organized for fraternal or religious purposes, nor any school, educational or charitable institution owned and conducted by, or affiliated with, a church or religious institution, nor any exclusively social club, corporation or association that is not organized for profit.

(e) "Employment Agency" includes both public and private employment agencies and any person, and any labor organization or labor union having a hiring hall or hiring office regularly undertaking, with or without compensation, to procure opportunities to work, or to procure, recruit, refer or place employees.

(f) "Labor Organization" includes any organization, or labor union, craft union, or any voluntary unincorporated association designed to further the cause of the rights of union labor which is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms, or conditions of employment, or apprenticeships or applications for apprenticeships, or of other mutual aid or protection in connection with employment, including apprenticeships or applications for apprenticeships.

(g) "Person" includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, or union labor associations, corporations, legal representatives, trustees in bankruptcy or receivers.

(h) "Unfair Employment Practices" includes only those practices specified in Section 3 of this Act.

Section 3. Unfair Employment Practices.) It is an unfair employment practice:

(a) For any employer, because of the race, color, religion, national origin or ancestry of an individual to refuse to hire, to segregate, or otherwise to discriminate against such individual with respect to hire, selection and training for apprenticeship in any trade or craft, tenure, terms or conditions of employment; or

(b) For any employment agency to fail or refuse to classify properly, refer for employment, refer for apprenticeship, or accept applications for any apprenticeship, or otherwise to discriminate against any individual because of his race, color, religion, national origin or ancestry; or

(c) For any labor organization because of the race, color, religion, national origin or ancestry of any person to discriminate against such person, or to limit, segregate or classify its membership with respect to such person, or to limit such person's employment opportunities, such person's selection and training for apprenticeship in any trade or craft, or otherwise to take, or fail to take, any action which affects adversely such person's status as an employee or as an applicant for employment or as an apprentice, or as an applicant for apprenticeships, or such person's wages, tenure, hours or employment or apprenticeships conditions; or

(d) For any employer, employment agency or labor organization to discriminate against any person because he or she, reasonably and in good faith, has opposed any practice forbidden in this Act, or because he or she, reasonably and in good faith, has made a charge, testified or assisted in any investigation, proceeding or hearing under this Act; or

(e) For any person to compel or coerce any person to engage in any of the acts declared by this Act to be unfair employment practices.

Nothing in this Act shall preclude an employer from firing or selecting between persons for (1) any reason except for the unfair employment practices specifically prohibited by this Act, or (2) a bona fide occupational qualification.

Section 4. Public Contracts.) Every contract to which the State, any of its political subdivisions or any municipal corporation is a party shall be conditioned upon the requirement that the supplier of materials or services or the contractor and his subcontractors, and all labor organizations furnishing skilled, unskilled, and

craft union skilled labor, or who may perform any such labor or services, as the case may be, shall not commit an unfair employment practice in this State as defined in this Act. To the full extent to which the State may have authority with respect to such contracts, this Section shall be applicable.

Section 5. Illinois Fair Employment Practices Commission.)

(a) The Fair Employment Practices Commission is created, to consist of 5 members, all of whom shall be bona fide residents of Illinois for 5 years last past, appointed by the Governor with the advice and consent of the Senate, no more than 3 of whom shall be of the same political party and one of whom shall be designated by the Governor as Chairman. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in the case of a vacancy with the advice and consent of an interim committee composed of 3 members of the Senate appointed by the President Pro Tempore thereof and 3 members of the House of Representatives appointed by the Speaker thereof.

(b) Of the members first appointed, 2 shall be appointed for a term of 2 years each, and 3 (including the chairman) shall be appointed for a term of 4 years each, commencing the 3rd Monday in January, 1961. Thereafter each member shall serve for a term of 4 years; except that any member chosen to fill a vacancy occurring otherwise than by expiration of the term shall be appointed only for the unexpired term of the member whom he shall succeed. In the event of a vacancy in office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate. Such temporary appointment is subject to the advice and consent of the interim committee provided for in this section.

(c) A single vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission. A majority of the members of the Commission then in office shall constitute a quorum.

(d) Members of the Commission shall receive no salary, but shall be reimbursed for expenses actually and necessarily incurred by them in the performance of their duties.

Section 6. Powers and Duties of the Commission.)

In addition to other powers and duties prescribed in this Act, the Commission shall have the following powers and duties:

(a) To meet and function at any place within the State.

(b) To establish and maintain offices in Springfield and Chicago.

(c) To select and fix the compensation of an executive director, which shall not exceed $15,000 per year, of hearing examiners who shall be attorneys duly licensed to practice law in this State, technical advisors and such other employees as it may deem necessary.

(d) To adopt, promulgate, amend and rescind rules and regulations not inconsistent with the provision of this Act.

(e) To receive, investigate and determine charges filed by complainants with it in conformity with this Act.

(f) To report to the Governor and the General Assembly at the beginning of each General Assembly and upon request.

Section 7. Educational Program.)

For the Purpose of promoting equal employment opportunity, regardless of race, color, religion, national origin or ancestry, and to create and to maintain better community understanding, the Commission may issue such publications, conduct such research, and make such surveys as in the judgment of the Commission will tend to promote equality of employment opportunity, including apprenticeship, regardless of race, color, religion, national origin or ancestry.

Section 8. Procedure.)

(a) Whenever within 120 days after the date that an unfair employment practice allegedly has been committed, a charge in writing under oath or affirmation is filed with the Commission by a complainant and in such detail as to substantially apprise any party properly concerned as to the time, place and facts with respect to such alleged unfair employment practice, that any employer, labor organization, employment agency, or person, hereinafter referred to as a respondent, has committed such unfair employment practice, the Commission shall promptly serve a copy of the charge or summary thereof on the respondent and thereafter shall institute an investigation by its employees to ascertain the facts relating to such alleged unfair employment practice. If it is determined by the Commission, after such investigation, that there is not substantial evidence that the alleged un-

fair employment practice has been committed, the charge shall be dismissed; otherwise the Commission, or any member thereof, shall endeavor to eliminate the effect thereof and prevent repetition thereof by means of conference and conciliation. The complainant and respondent shall be notified of the time and place of the conference by registered or certified mail at least 10 days prior thereto and either or both parties shall appear at such conference or conciliation in person or by attorney. The place fixed shall be within 35 miles of the place where the unfair practice is alleged to have been committed. What occurs in the conference or conciliation meeting shall not be disclosed by the Commission unless the respondent requests in writing that such disclosure be made. However, the Commission shall notify the complainant and the respondent of the disposition of every charge filed and the terms of any settlement, adjustment or dismissal thereof. Any member of the Commission who takes part in an investigation shall thereby be disqualified to hear any evidence on the cause in question. Except as herein above provided, manner and form of filing such charges shall be in accordance with such rules and regulations as the Commission shall from time to time prescribe.

(b) In case of failure to settle or adjust any such charge by conference and conciliation, the Commission shall cause to be issued and served upon such respondent a written complaint, under oath or affirmation, stating the charge of unfair employment practice substantially as alleged in the charge theretofore filed with the Commission as hereinbefore provided and the relief sought on behalf of complainant and containing a notice of public hearing before a commissioner or a duly appointed hearing examiner at a place therein fixed, to be held not less than 20 nor more than 60 days after the service of such complaint. The place fixed shall be within 35 miles of the place where the unfair employment practice is alleged to have been committed.

(c) Whenever a charge of an unfair employment practice has been properly filed, the Commission, within 120 days thereof, shall either issue and serve a complaint in the manner and form set forth in this Section or shall order that no complaint be issued. Any such order shall be duly served upon both the complainant and the respondent.

(d) Any complaint may be amended under oath by leave of the Commission or any member thereof upon reasonable notice to all interested parties at any time prior to the issuance of an order based theron. The respondent shall have the right to file an answer under oath or affirmation to the original or amended complaint and shall have the right to amend his answer under oath or affirmation upon reasonable notice to the Commission. Both the complainant and the respondent may appear at any hearing in person or by attorney and examine and cross examine witnesses.

(e) The testimony taken at the hearing shall be under oath or affirmation and a transcript thereof made and filed in the office of the Commission. The testimony taken at the hearing shall be subject to the same rules of evidence which apply in courts of record.

(f) When all the testimony has been taken, the commissioner or hearing examiner shall determine whether the respondent has engaged in or is engaging in the unfair employment practice with respect to the complainant as charged in the complaint. A determination sustaining a complaint shall be based upon a preponderance of the evidence. The commissioner or hearing examiner then shall state his recommendations in writing and, if he finds against the respondent, shall issue and cause to be served on such respondent and the complainant an order requiring such respondent to cease and desist from the unfair employment practice complained of, and to take such further affirmative or other actions with respect to the complainant as will eliminate the effect of the practice originally complained of. If, upon all the evidence, the commissioner or hearing examiner finds that a respondent has not engaged in the unfair employment practice charged in the complaint or that a preponderance of the evidence does not sustain the complaint, he shall state his findings of fact and shall issue and cause to be served on the respondent and the complainant an order dismissing said complaint.

(g) Review by Commission.)

(1) The decision of the commissioner or hearing examiner shall be filed with the Commission. Unless a petition for review is filed by either party within 15 days after the receipt by said party of the copy of said decision, and unless such party petitioning for a review shall within 20 days after the receipt by him of the copy of the decision, file with the Commission either an agreed statement of the facts appearing upon

the hearing before the commissioner or hearing examiner, or, if such party shall so select, a correct transcript of evidence of the proceedings at such hearings, then the decision shall become the decision of the Commission if it shall be supported by substantial evidence. The Commission, or any member thereof, may grant further time, not exceeding 30 days, in which to file such agreed statment or transcript of evidence. Such agreed statement of facts or correct transcript of evidence, as the case may be, shall be authenticated by the signatures of the parties or their attorneys, and in the event they do not agree as to the correctness of the transcript of evidence it shall be authenticated by the signature of the commissioner or hearing examiner.

(2) If a petition for review and agreed statement of facts or transcript of evidence is filed, as provided herein, the Commission shall promptly review the decision of the commissioner or hearing examiner and all questions of law or fact which appear from the said statement of facts or transcript of evidence, and such additional evidence as the parties may submit. After such hearing upon review, the Commission shall file in its office its decision thereon, and shall immediately send to each party or his attorney a copy of such decision and a notification of the time when it was filed.

(3) Such review and hearing may be held in its office or elsewhere as the Commission may deem advisable. The taking of testimony on such hearing may be had before any member of the Commission and in the event either of the parties may desire an argument before others of the Commission, such argument may be had upon written demand therefor filed with the commissioner at least 5 days before the date of the hearing, in which event such argument shall be had before not less than a majority of the Commission. The Commission shall give 10 days' notice to the parties or their attorneys of the time and place of such taking of testimony and of such argument.

(4) The Commission, within the limitations of time as fixed in this section, may, in its discretion, or for good cause, order a trial de novo before the Commission upon application of either party. The complaint and other documents in the nature of pleadings filed by either party, together with the decisions of the commissioner or hearing examiner and the statement of facts or transcript of evidence hereinbefore provided, shall be the record of the proceedings and shall be subject to review as hereinafter provided.

(h) The Commission may, at any time prior to final order of the Court in a proceeding under Section 10 or 11, upon reasonable notice, modify or set aside in whole or in part, any finding or order made by it except an order or finding that a respondent has not engaged in the unfair employment practice charged in the complaint.

Section 9. Additional Powers of the Commission; Appearances of Witnesses; Service of Process.)

For the purpose of all hearings and investigations:

(a) The Chairman of the Commission has the power to issue subpoenas either for the Commission or any respondent requiring the attendance and testimony of witnesses and the production of any evidence which relates to the particular unfair employment practice charged, and any person duly conducting a hearing hereunder may administer oaths or affirmations, examine witnesses and receive evidence.

(b) If any witness resides outside of the State, or through illness or any other cause is unable to testify before the Commission at the hearing or investigation, his or her testimony or deposition may be taken, within or without the State, in the same manner as is provided for in "An Act in regard to evidence and depositions in civil cases," approved March 29, 1872, as heretofore or hereafter amended.

(c) Within 5 days after service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Commission to revoke, and the Commission shall revoke, such subpoena if in its opinion the evidence, the production of which is required, does not relate to any matter under investigation or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence the production of which is required. If such petition is filed, such person shall not be required to respond to the subpoena of the Commission until the Commission has acted on such petition.

(d) In case of failure or refusal to obey a subpoena issued to any person, the Circuit Court of the county in which such person resides or has his or her principal place of business, upon

petition by the Commission, and after a hearing on such petition, has jurisdiction to issue an order requiring such person to appear before the Commission, there to produce evidence, if so desired, or there to give testimony touching the matter under investigation or in question. Before petitioning the Court for such order, the Commission shall first serve notice upon such person, not less than 5 days prior thereto, stating the time and place where the petition is to be presented. Failure to obey any order issued by the Court may be punished by the Court as contempt thereof.

(e) Complaints, orders and other process and proper papers may be served personally or by registered or certified mail. The verified return of the individual making service in accordance with this Section, and setting forth the manner of such service shall constitute proof of service. Witnesses summoned before the Commission or a member thereof shall be paid the same fees and mileage as are paid witnesses in the Circuit Courts of this State, and witnesses whose depositions are taken or the person taking the same shall severally be entitled to the same fees as are paid for like services in the Circuit Courts of this State.

Section 10. Judicial Review.)

Any complainant or respondent may apply for and obtain judicial review of an order of the Commission entered under this act in accordance with the provisions of the "Administrative Review Act," approved May 8, 1945, as heretofore or hereafter amended; and the Commission in proceedings under this Section may obtain an order of Court for the enforcement of its order.

Section 11. Judicial Enforcement.)

Whenever it appears that any person has violated a valid order of the Commission issued pursuant to Section 8 of this Act, the Commission shall commence an action in the name of the People of the State of Illinois by petition, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission. Upon the commencement of such action the Court shall have jurisdiction of the proceedings and power to grant or refuse, in whole or in part, the relief sought, provided that the Court may stay an order of the Commission in accordance with the provisions of paragraph (1) (a), Section 12 of the "Administrative Review Act," pending disposition of the proceedings. The Court may punish for any violation of its order as in case of civil contempt.

Section 12. Venue.)

The proceedings provided in Sections 10 and 11 shall be commenced in the Circuit Court in and for the county wherein the unfair employment practice which is the subject of the Commission's order was committed or wherein any person required to cease and desist by such order resides or transacts business and shall be given precedence over all other civil cases except cases arising under the "Workmen's Compensation Act," approved July 9, 1951, as heretofore or hereafter amended or the "Workmen's Occupational Diseases Act," approved July 9, 1951, as heretofore or hereafter amended.

Section 13.

For the purposes of this Act, summonses, notices or writs served upon any officer of any labor organization shall be sufficient to acquire jurisdiction against such labor organization, or labor union, or voluntary unincorporated union association, and all of its officers, members and representatives.

Section 14.

This Act shall apply to all unfair employment practices occurring on or after July 1, 1961.

Section 15. Separability.)

If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

Section 16. Short Title.)

This Act shall be known and may be cited as the "Fair Employment Practices Act."

Section 17.

The sum of $100,000, or so much thereof as may be necessary, is appropriated to the Commission for the administration of this Act.

EMPLOYMENT
Fair Employment Practices—Missouri

Senate Bill 257 of the 1961 session of the Missouri legislature, approved on April 12, 1961, forbids discrimination on the basis of race, creed, color, religion, national origin, or ancestry, in hiring, employment conditions, and labor union membership. The Missouri Commission on Human Rights is created, and its functions and powers are defined.

AN ACT To Eliminate and Prevent Discriminatory Practices in Matters of Employment Because of Race, Creed, Color, Religion, National Origin, or Ancestry, and Prescribing Penalties for Violations.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. When used in this act the term:

(1) "Commission" mean the Missouri commission on human rights.

(2) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustes in bankruptcy, receivers, or other organized groups of persons.

(3) "Employer" includes the state, or any political or civil subdivision thereof, or any person employing fifty or more persons within the state, and any person acting in the interest of an employer, directly, but does not include corporations and associations owned and operated by religious or sectarian groups.

(4) "Labor organization" includes any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or for other mutual aid or protection in relation to emmployment.

(5) "Employment agency" includes any person undertaking for compensation to procure opportunities to work or to procure, recruit, refer, or place employees.

Section 2. The commission shall have the following functions, powers, and duties:

(1) To seek to eliminate and prevent discrimination in employment because of race, creed, color, religion, national origin, or ancestry by employers, labor organizations, employment agencies, or other person, and to take other actions against discrimination because of race, creed, color, religion, national origin, or ancestry as herein provided; and the commission is hereby given general jurisdiction and power for such purposes.

(2) To effectuate the purposes of this act first by conference, conciliation and persuasion so that the persons may be guaranteed their civil rights and good will be fostered.

(3) To formulate policies to effectuate the purposes of this act and to make recommendations to agencies and officers of the state or local subdivisions of government in aid of such policies and purposes.

(4) To appoint such employees and agents as it may deem necessary, fix their compensation within the appropriations provided, and prescribe their duties.

(5) To obtain upon request and utilize the services of all governmental departments and agencies.

(6) To adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this act, and the policies and practices of the commission in connection therewith.

(7) To receive, investigate, initiate, and pass upon complaints alleging discrimination in employment because of race, creed, color, religion, national origin, or ancestry.

(8) To hold hearings, subpoena witnesses, compel their attendance, administer oaths, to take the testimony of any person under oath, and in connection therewith, to require the production for examination of any books or papers relating to any matter under investigation or in question before the commission.

(9) To issue publications and the results of studies and research which will tend to promote good will and minimize or eliminate discrimination in employment because of race, creed, color, religion, national origin, or ancestry.

(10) To render each year to the governor and to the legislature a full written report of all its activities and of its recommendations.

(11) To adopt an official seal.

Section 3. It shall be an unlawful employment practice:

(1) For an employer, because of the race, creed, color, religion, national origin, or ancestry

of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.

(2) For a labor organization to exclude or to expel from its membership such indvidual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer because of race, creed, color, religion, national origin, or ancestry of any individual.

(3) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination, because of race, creed, color, religion, national origin, or ancestry, unless based upon a bona fide occupational qualification.

(4) For any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any person because he has opposed any practices forbidden under this law or because he has filed a complaint, testified, or assisted in any proceeding under this act.

(5) For any person, whether an employer or an employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

Section 4. 1. Any person claiming to be aggrieved by an unlawful employment practice may, by himself, his agent, or his attorney-at-law make, sign, and file with the commission a verified complaint in writing which shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful employment practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the commission. The attorney general may, in like manner, make, sign, and file such complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this law, may file with the commission a verified complaint asking for assistance by conciliation or other remedial action.

2. After the filing of any complaint, the chairman of the commission shall designate one of the commissioners to make, with the assistance of the commission's staff, prompt investigation in connection therewith; and if such commissioner shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion, and shall report his findings to the commission. The members of the commission and its staff shall not disclose the contents of the report or what has occurred in the course of such endeavors.

3. In case of failure to eliminate such practice, the chairman of the commission, if in his judgment circumstances so warrant, he shall cause to be issued and served in the name of the commission, a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization, or employment agency named in such complaint, hereinafter referred to as respondent, to answer the charges of such complaint at a hearing before at least three members of the commission sitting as the commission, at a time and place to be specified in such notice. The place of any such hearing shall be the office of the commission or such other place as may be designated by it. Provided, however, that if the person complained against shall so request in writing, such hearing shall be held in the county of such person's residence or business location. The case in support of the complaint shall be presented before the commission by the office of the Attorney General of the State of Missouri, and the commissioner who shall have previously made the investigation shall not participate in the hearing except as a witness, nor shall he participate in the deliberation of the commission in such case; and the aforesaid endeavors at conciliation shall not be received in evidence. The respondent may file a written verified answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony. At the discretion of the commission, the complainant may be allowed to intervene and present testimony in person or by counsel. The commission or the complainant shall have the power reasonably and fairly to amend any complaint, and the respondent shall have like power to amend his answer. The testimony taken at the hearing shall be under oath and be transcribed. If, upon all the evidence at the hearing the com-

mission shall find that a respondent has engaged in any unlawful employment practice as defined in this act, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice and to take affirmative action to require reinstatement or upgrading of employees with or without back pay. To require hiring or restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance. If, upon all the evidence, the commission shall find that a respondent has not engaged in any such unlawful employment practice, the commission shall state its findings of fact and shall issue and cause to be served on the complainant, an order dismissing the said complaint as to such respondent. A copy of its order shall be delivered in all cases to the attorney general, and such other public offices as the commission deems proper. The commission shall establish rules of practice to govern, expedite, and effectuate the foregoing procedure and its own actions thereunder. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination.

Section 5. (1) Any complainant, respondent, or other person aggrieved by an order of the commission may obtain judicial review thereof by applying, within 30 days after the date of issuance of the commission's order, to the Circuit Court of Cole County or to the circuit court of the county in which the unlawful employment practice is alleged to have occurred. The court shall issue its order requiring the commission to certify and deliver to the clerk of the court the entire record made before the commission, together with the findings, order and decision of the commission thereon. In the circuit court the case shall be tried de novo, in the same manner as in the trial of other civil actions, but the court may refuse to permit the introduction of new evidence if such new evidence was available and known to the party seeking to introduce the same at the time of the hearing before the commission and could have been produced before the commission by the exercise of reasonable diligence. Any party to the proceeding in the circuit court may offer in evidence the record made before the commission and evidence offered before but refused by the commission, subject to proper objection as to the admissibility of any part thereof. Any party to the proceeding in the circuit court shall be entitled to a trial of the issues by a jury, upon written request therefor filed before the trial date.

(2) At the conclusion of the trial in the circuit court, the court may, consistent with the verdict of the jury affirm or reverse in whole or in part, or may modify, the decision and order of the commission, or if the court deems it necessary may remand the case to the commission for futher action not inconsistent with the court's judgment. Any final decision of the circuit court in any such proceeding may be appealed to the courts of appeal and the Supreme Court as in the case of other civil actions.

(3) If no proceeding for review is instituted in the circuit court within the time herein prescribed, the commission may obtain an order of court for the enforcement of the commission's decision and order in a proceeding brought in the circuit court of the county wherein the unlawful employment practice which is the subject of the commission's order occurred or wherein any person required in the order to cease and desist from an unlawful employment practice or to take other affirmative action resides or conducts his business.

Section 6. Any person, employer, labor organization, or employment agency who or which shall willfully resist, prevent, impede, or interfere with the commission or any of its members or representatives in the performance of duty under this law, or shall wilfully violate an order of the commission, or any person who knowingly makes a false complaint under the provisions of this act shall be guilty of a misdemeanor.

Section 7. The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision hereof shall not apply. Nothing contained in this act shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, creed, color, religion, national origin, or ancestry.

HOUSING
Contiguously-Located—Connecticut

Act No. 472 of the 1961 session of the Connecticut legislature, approved by the governor on June 5, 1961, extends the coverage of that state's ban on discrimination in places of public accommodation [4 Race Rel. L. Rep. 774 (1959)] to include building lots. The number of contiguously-located lots necessary for application of the Act is lowered from five to three, with the number to be computed by including lots owned or controlled within one year preceding the discriminatory offense. In the text reproduced below, new law is in italics, old law to be omitted is in brackets.

AN ACT Concerning Discrimination in Public Accommodations and Rental Housing

Be it enacted by the Sentate and House of Representatives in General Assembly convened:

Section 1.

Section 53-35 of the 1959 supplement to the general statutes is repealed and the following is substituted in lieu thereof: All persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accomodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed or color of the applicant therefor shall be a violation of the provisions of this section. Any discrimination, segregation or separation, on account of race, creed or color, shall be a violation of this section. A place of public accommodation, resort or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation *or building lot, on which it is intended that a housing accommodation will be constructed,* offered for sale or rent which is one of [five] *three* or more housing accommodations *or building lots* all of which are located on a single parcel of land or parcels of land that are contiguous without regard to highways or streets, and all of which any person owns or otherwise controls the sale or rental thereof *or has owned or otherwise controlled the sale or rental thereof within one year prior to an act in violation of this section. In determining ownership or control of a particular number of housing accommodations or lots for purposes of this section, all housing accommodations or lots which are owned or controlled, directly or indirectly, by the same interest shall be deemed to be owned or controlled by one person.* Any person who violates any provision of this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days or both.

Section 2.

This act shall not apply to proceedings pending before the civil rights commission or in any court on the effective date of this act.

HOUSING
Privately-Owned—New York

The New York City ordinance prohibiting discrimination in private housing on the basis of race, color, religion, national origin or ancestry (3 Race Rel. L. Rep. 92), has been extended to control the sale, rental or leasing of all property except the rental of: (1) an apartment in an owner-occupied two-family house; (2) a room or rooms within an owner-

occupied one-family house; or (3) a room or rooms by a tenant occupying an apartment. Reproduced below is the full text of the ordinance as amended:

Be it enacted by the Council of the City of New York as follows:

Section 1. Chapter 41 of the administrative code of the city of New York is hereby amended by adding thereto a new title to be title X, to read as follows:

TITLE I

Discrimination and Segregation in Private Dwellings

§ X41-1.0 Legislative declaration. In the city of New York, with its great cosmopolitan population consisting of large numbers of people of every race, color, religion, national origin and ancestry, many persons have been compelled to live in circumscribed sections under substandard, unhealthful, unsanitary and crowded living conditions because of discrimination and segregation in housing. These conditions have caused increased mortality, morbidity, delinquency, risk of fire, intergroup tension, loss of tax revenue and other evils. As a result, the peace, health, safety and general welfare of the entire city and all its inhabitants are threatened. Such segregation in housing also necessarily results in other forms of segregation and discrimination which are against the policy of the state of New York. It results in racial segregation in public schools and other public facilities, which is condemned by the constitutions of our state and nation. In order to guard against these evils, it is necessary to assure to all inhabitants of the city equal opportunity to obtain living quarters, regardless of race, color, religion, national origin or ancestry. It is hereby declared to be the policy of the city to assure equal opportunity to all residents to live in decent, sanitary and healthful living quarters, regardless of race, color, religion, national origin or ancestry, in order that the peace, health, safety and general welfare of all the inhabitants of the city may be protected and insured.

§ X41-2.0 Definitions.

For the purposes of this article the following definitions shall apply to the following terms:

a. The term "housing accommodation" includes any building structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, at the home, residence or sleeping place of one or more human beings.

b. The terms "single-family private dwelling" and "two-family private dwelling" are buildings or structures designed for and used exclusively as defined in section 4, subdivision 6, of the multiple dwelling law of the state of New York.

c. The term "apartment" is that portion of a dwelling consisting of one or more rooms arranged to be occupied as a separate unit.

d. The terms "dwelling" and "family" shall be deemed to include those terms as they are defined in section 4, subdivisions 4 and 5, respectively, of the multiple dwelling law of the state of New York.

§ 41-3.0 Prohibited acts.

a. Except as otherwise provided in this section, no owner, lessee, sublessee, assignee, real estate broker, real estate salesman, managing agent of, or other person having the right to sell, rent, lease, sublease, assign, transfer or otherwise dispose of a housing accommodation, or an agent of any of these, shall refuse to sell, rent, lease, sublease, assign, transfer or otherwise deny to or withhold from any person or group of persons such housing accommodations, or represent that such housing accommodations are not available for inspection, when in fact they are so available, because of the race, color, religion, national origin or ancestry of such person or persons, or discriminate against or segregate any person because of his race, color, religion, national origin or ancestry, in the terms, conditions or privileges of the sale, rental, lease, sublease, assignment, transfer or other disposition of any such housing accommodations or in the furnishing of facilities or services in connection therewith. Nothing in this title shall be construed to apply to the rental of an apartment in a two-family private dwelling by the owner of such dwelling when the other apartment in such dwelling is occupied by such owner; or the rental of a room or rooms within a single-family private dwelling or within any apartment by the tenant of such apartment when such apartment is occupied by such tenant. Nothing in this title shall be deemed to permit any rentals otherwise prohibited by law.

b. No person shall publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind relating to the sale, rental, lease, sublease, assignment, transfer or listing of a housing accommodation or accommodations which indicates any preference, limitation, specification or discrimination based on race, color, religion, national origin or ancestry.

c. No person, bank, banking organization, mortgage company, insurance company or other financial institution or lenders, or any agent or employee thereof, to whom application is made for financial assistance for the purchase, lease, acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation shall:

(1) discriminate against any person or group of persons because of race, color, religion, national origin or ancestry of such person or group of persons or of the prospective occupants or tenants of such real property in the granting, withholding, extending, modifying, or renewing, or in the rates, terms, conditions or privileges of, any such financial assistance or in the extension of services in connection therewith; or

(2) use any form of application for such financial assistance or make any record of inquiry in connection with applications for such financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, national origin or ancestry, or any intent to make any such limitation, specification or discrimination.

d. No person shall assist, aid, abet, induce, incite or coerce another person to commit an act or engage in a practice that is forbidden by this law.

e. Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

§ X41-4.0 Procedure for handling complaints.

a. Any person claiming to be aggrieved by a violation of section X41-3.0 hereof may file with the commission on intergroup relations, a complaint in writing which shall state the name and address of the owner or other person alleged to have committed the violation complained of and shall set forth the particulars thereof and such other information as may be required by such commission. Upon the filing of such complaint, or upon its own motion whenever it has reason to believe that any owner or other person has violated section X41-3.0 hereof, such commission shall exercise its powers with a view to conciliating the matter and eliminating any discriminatory practice it finds to exist.

b. In case of failure of the commission on intergroup relations to conciliate and eliminate a practice which it considers discrimination or segregation in violation of section X41-3.0 hereof it shall refer the same to the fair housing practices panel hereinafter created, with its recommendations.

c. There is hereby created a fair housing practices panel to consist of twelve persons, appointed by the mayor and to serve at his pleasure. Such persons shall not be members of the commission on intergroup relations. The members of the panel shall serve without compensation but shall be entitled to reimbursement of their necessary expenses. For each case that shall be referred to the panel pursuant to subdivision b hereof, the mayor shall designate any three members of the panel as a fair housing practices board which shall exercise the powers and duties provided for in subdivision d hereof.

d. It shall be the duty of the fair housing practices board to review cases of alleged discrimination or segregation in violation of section X41-3.0 hereof, referred by the commission on intergroup relations in accordance with subdivision b hereof and to determine in each case whether in its judgment court action is warranted. The board shall have power to hold hearings and to issue subpoenas. If it shall find in the affirmative, it may direct the corporation counsel to bring equitable proceedings in the supreme court, in the name of the city, for the enforcement of the provisions of this title.

e. Proceedings had under this title before the commission on intergroup relations and the fair housing practices board shall be confidential.

Nothing herein shall be construed to prohibit the publication of reports and statistics in such manner and form as to prevent the identification of parties involved in proceedings under this title in matters not referred by the commission to the panel pursuant to subdivision b hereof.

§ 2. This local law shall take effect immediately.

INSURANCE
Discriminatory Rates—New York

Chapter 254 of the 1961 Acts of the New York legislature, approved by the governor on April 3, 1961, prohibits discrimination in rates or terms of insurance policies because of the race, color, creed or national origin of the insured.

AN ACT to amend the insurance law, in relation to the prohibition of racial, religious and related types of discrimination in insurance underwriting.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section forty of the insurance law is hereby amended by adding thereto a new subsection, to be subsection ten, to read as follows:

10. Except as provided in section forty-four, no association, corporation, firm, fund, individual, group, order, organization, society or trust subject to the supervision of the superintendent of insurance shall make any distinction or discrimination between persons because of race, color, creed or national origin, as to the premiums or rates charged for insurance policies or in any other manner whatever; nor shall any such association, corporation, firm, fund, group, individual, order, organization, society or trust demand or require a greater premium from persons because of race, color, creed or national origin than is at that time required by such association, corporation, firm, fund, group, individual, order, organization, society or trust from other persons in similar cases; nor shall any such association, corporation, firm, fund, group, individual, order, organization, society or trust make or require any rebate, discrimination or discount upon the amount to be paid or the service to be rendered on such policy because of race, color, creed or national origin, nor insert in the policy any condition, nor make any stipulation, whereby such person insured shall bind himself, or his heirs, executors, administrators or assigns, to accept any sum or service less than the full value or amount of such policy in case of a claim accruing thereon other than such as are imposed upon other persons in similar cases; and any such stipulation or condition so made or inserted shall be void. No such association, corporation, firm, fund, group, individual, order, organization, society or trust shall reject any application for a policy of insurance issued and/or sold by it, or refuse to issue, renew or sell such policy after appropriate application therefor, nor shall any lower rate be fixed or discrimination be made in the fees or commissions of agents or brokers for writing or renewing such a policy solely by reason of the applicant's race, creed, color or national origin.

§ 2. Subsection three of section two hundred nine of such law, at last amended by chapter eighteen of the laws of nineteen hundred sixty, is hereby repealed.

§ 3. This act shall take effect immediately.

PUBLIC ACCOMMODATIONS, HOUSING
Discrimination—Canada

Bill 61 of the 2d Session of the 26th Ontario legislature, approved March 16, 1961, amends that province's Fair Accommodation Practices Act to include prohibitions against discrimination by indirect means in places of public accommodation, and against discrimination in the renting of apartments.

AN ACT To Amend

The Fair Accommodation Practices Act

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Section 2 of *The Fair Accommodation Practices Act* is amended by inserting after "person" in the first line "directly or indirectly, alone or with another, by himself or by the interposition of another", so that the section shall read as follows:

2. No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted because of the race, creed, color, nationality, ancestry or place of origin of such person or class of persons.

2. *The Fair Accomodation Practices Act* is amended by adding thereto the following section:

2a. No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall deny to any person or class of persons occupancy of any dwelling unit in any building that contains more than six self-contained dwelling units because of the race, creed, colour, nationality, ancestry or place of origin of such person or class of persons.

3. This Act may be cited as *The Fair Accommodation Practices Amendment Act,* 1960-61.

PUBLIC ACCOMMODATIONS
Discrimination—Missouri

Ordinance No. 50553 of the St. Louis, Missouri, Board of Aldermen, approved on June 1, 1961, prohibits discriminatory practices in places of public accommodations because of race, color, religious beliefs, ancestry, or national origin. The St. Louis Council on Human Relations, and a special "Anti-Discrimination Division" within the council, are charged with enforcement of the ordinance.

This bill is introduced and sponsored by the following Members of the Board of Aldermen: Archie Blaine, A. J. Cervantes, William Clay, John T. Curry, Harold I. Elbert, John D. Gumersell, Al Harris, D. T. Lawson, T. H. Mayberry, Wayman F. Smith and Lawrence E. Woodson.

An ordinance defining discriminatory practices in places of public accommodation; prohibiting the same; and providing penalties for the violation thereof.

WHEREAS, each member of the Board of Aldermen recognizes that the government of the City of St. Louis was organized to protect and promote the health, safety, and welfare of all the residents of the City of St. Louis, including minority groups; and

WHEREAS, each alderman was elected by and is under a duty to represent all groups and segments of his constituency regardless of their

race, color, creed, national ancestry, or origin; and

WHEREAS, each alderman is cognizant of his duty to protect and foster the welfare of persons residing in his ward and to prevent, insofar as possible, any discrimination in places of public accommodation regardless of a person's religious beliefs, and to insure that such person if he be a Catholic, Jew, Protestant, or a member of another religious sect, not be discriminated against in places of public accommodation; and

WHEREAS, each alderman is cognizant of his duty to protect and foster the welfare of persons residing in his ward and to prevent, insofar as possible, any discrimination in places of public accommodation regardless of a person's race, and to insure that such person if he be a Caucasian, Negro, or Mongolian, not be discriminated against in places of public accommodations; and

WHEREAS, each alderman is cognizant of his duty to protect and foster the welfare of persons residing in his ward and to prevent, insofar as possible, any discrimination in places of public accommodation regardless of a person's ancestry or national origin, and to insure that such person if he be English, Irish, French, Italian, Spanish, German, Hungarian, Austrian, Slav, Czech, Greek, Lithuanian, Armenian, Russian, Norwegian, Swedish, Polish, Syrian, African, Indian, Chinese, Japanese, Filipino, etc., not be discriminated against in places of public accommodations; and

WHEREAS, in order to insure that there be no discriminatory practices in places of public accommodations on account of race, color, religious beliefs, ancestry, or national origin, the Board of Aldermen, in order to protect the public welfare, hereby enact this ordinance. NOW, THEREFORE,

Be it ordained by the City of St. Louis, as follows:

Section One. It is hereby declared to be the policy of the City of St. Louis in the exercise of its licensing and police powers for the preservation of the peace and the protection of the comfort, health, welfare and safety of the City of St. Louis and the inhabitants thereof, to prohibit discriminatory practices in places of public accommodations as hereinafter defined.

Section Two. Definitions. When used herein:

(a) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, or other group of persons.

(b) The term "Council" means the St. Louis Council on Human Relations as defined in Ordinance No. 45184 of the ordinances of the City of St. Louis; and the term "Anti-Discrimination Division" means a special standing committee consisting of five (5) members of the St. Louis Council on Human Relations, said five members to be designated by the chairman of the St. Louis Council on Human Relations, each member so designated to be approved by a majority of the members of said Council.

(c) The phrase "places of public accommodation" means all places or businesses offering or holding out to the general public services or facilities for the peace, comfort, health, welfare and safety of such general public including, but not limited to, public places providing food, shelter, recreation and amusement.

Section Three. Discriminatory practices, as hereinafter defined and established, in places of public accommodation are hereby prohibited and declared unlawful.

(a) It shall be a discriminatory practice directly or indirectly to deny, refuse or withhold from any person, within the City of St. Louis, on account of race, color, religious beliefs, ancestry or national origin, full and equal accommodation advantages, facilities and privileges in all places of public accommodation.

(b) It shall be a discriminatory practice for the owner, lessee, manager, proprietor, concessionaire, custodian, agent or employee of a place of public accommodation within the City of St. Louis to treat differentially any person in such service or sale of privilege, facility, or commodity on account of race, color, religious beliefs, ancestry or national origin, or to segregate or require the placing of any person in any separate section or area of the premises or facilities, in such service or sale of privilege, facility or commodity, on account of race, color, religious beliefs, ancestry or national origin.

(c) It shall be a discriminatory practice to place, post, maintain, display, or circulate, or knowingly cause, permit or allow the placing, posting, maintenance, display or circulation of any written or printed advertisement, notice or

sign of any kind or description to the effect that any of the accommodations, advantages, facilities or privileges of any place of public accommodation shall be refused, withheld from or denied to any person on account of race, color, religious beliefs, ancestry or national origin, or that the patronage of any person is unwelcome, objectionable, or not acceptable, desired or solicited on account of race, color, religious beliefs, ancestry or national origin, or that any person is required or requested to use any separate section or area of the premises or facilities on account of race, color, religious beliefs, ancestry, or national origin.

Section Four. The administration of this ordinance shall be the responsibility of the St. Louis Council on Human Relations. The Anti-Discrimination Division shall have full operating responsibility under the supervision of the Council for carrying out the provisions of this ordinance. In addition to any powers or duties heretofore conferred on said Council it shall have the power and duty to:

(a) Initiate on its own or receive, investigate and seek to adjust all complaints or discriminatory practices prohibited by this ordinance.

(b) By itself or through its Anti-Discrimination Division, to hold public or private hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath relating to any matter under investigation or in question. The Council may make rules as to the procedure for the issuance of subpoenas by the Anti-Discrimination Division. Contumacy or refusal to obey a subpoena issued pursuant to this section may be certified to a City Court of the City of St. Louis for appropriate action.

Section Five. Procedure.

(a) Any person claiming to be aggrieved by a discriminatory practice prohibited by this ordinance may make, sign and file with the St. Louis Council on Human Relations a complaint in writing under oath, which shall state the name and address of the person alleged to have committed the discriminatory practice and which shall set forth the particulars thereof and contain such other information as may be required by the Council. Such complaints shall be filed within thirty (30) days after the alleged discriminatory act is committed. The Council, at any time it has reason to believe that any person has been engaged in discriminatory practices prohibited by this ordinance, may issue a complaint.

(b) If the Anti-Discrimination Division determines after investigation that probable cause exists for the allegations made in the complaint, the Anti-Discrimination Division shall attempt an adjustment by means of conference and conciliation. Sixty (60) days shall be allowed for this purpose. If the Anti-Discrimination Division determines that there is no probable cause for the allegations made in the complaint, then they shall dismiss the complaint and promptly notify the complainant and the respondent of this action. If no action is taken by the Anti-Discrimination Division within ninety (90) days after the complaint is filed, such complaint shall hereby be considered dismissed.

(c) In case of failure of conference or conciliation to obtain compliance with this ordinance, the Anti-Discrimination Division may either certify the entire case to the City Counselor for prosecution, or cause to be issued and served in the name of the Council a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person named in such complaint, hereinafter referred to as the respondent, to answer the charges of such complaint at a hearing before the Anti-Discrimination Division, at a time and place to be specified in such notice. The place of such hearing may be the office of the Council or another place designated by it. The case in support of the complaint shall be presented at the hearing by a member of the City Counselor's office who shall be counsel for the St. Louis Council on Human Relations; and no council member who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness nor shall participate in the deliberations of the Anti-Discrimination Division in such case. Any endeavors or negotiations for conciliation or admission or statement made in connection therewith shall not be received in evidence. The respondent may file a written answer to the complainant and appear at such hearing in person or otherwise with or without counsel, and submit testimony and be fully heard. The Anti-Discrimination Division conducting any hearing may permit reasonable amendments to any complaint or answer and the testimony taken at such hearing shall be under oath and be transcribed at the request of either party or by direction of the Anti-Discrimination Division. If,

upon all the evidence, the Anti-Discrimination Division finds that a respondent has engaged in any discriminatory practice as defined in Section Three (3), it shall state its findings of fact and shall issue and file with the Council and cause to be served on the respondent an order requiring such respondent to cease and desist from such discriminatory practice or practices, or make such other order as the circumstances warrant. If, upon all the evidence, the Anti-Discrimination Division finds that the respondent has not engaged in any alleged discriminatory practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint. The Council shall establish rules of practices to govern, expedite and effectuate the foregoing procedure.

(d) If either the complainant or the respondent is not satisfied with the determination of the Anti-Discrimination Division, he shall have the right to appeal such discrimination to the Council within twenty (20) days after the date of such determination. No member of the Anti-Discrimination Division may participate in determination of an appeal. All decisions of the Council on such majority, a quorum, for determination of appeals, shall consist of six members. On appeal the Council may dismiss the complaint, affirm the Anti-Discrimination Division's order or make such other appropriate order as shall effectuate the purposes of this ordinance.

(e) In the event the Anti-Discrimination Division shall have entered a cease and desist order from which no appeal is taken, and in those cases where such order is appealed and affirmed by the Council, the Council shall, in cases of noncompliance therewith, certify the entire case to the City Counselor for appropriate action. No prosecution shall be brought under this ordinance except upon such certification, provided, however, that in cases dismissed by failure of the Anti-Discrimination Division to act as provided in Section Five (b), or if the Anti-Discrimination Division dismisses a complaint, such dismissal being affirmed on appeal to the Council, the complainant may present such complaint directly to the City Counselor for such action as he shall deem advisable.

(f) All complaints, answers, investigations, conferences and hearings held under and pursuant to this ordinance shall be held confidential by the Council, the Anti-Discrimination Division and their agents and employees, provided, however, that the Anti-Discrimination Division may, at the request of the complainant, or on its own initiative, and shall, at the request of the respondent, declare the hearing provided for under Section Five (c) of this ordinance to be an open and public hearing.

(g) Within the limits of the listed specifications, the Anti-Discrimination Division shall have the power to formulate its own rules of procedure.

Section Six. Any persons violating any of the provisions of this ordinance shall be guilty of a misdemeanor and shall be fined not less than $25.00 nor more than $500.00.

Section Seven. If any of the provisions of this ordinance or portions thereof or the application of such provisions or portions to any person or circumstance shall be held invalid, the remainder of this ordinance and its application to persons or circumstances other than those to which it is held invalid shall not be affected thereby.

Section Eight. A copy of this ordinance shall be kept conspicuously posted in all places of public accommodation as herein defined and possessing any license from the City of St. Louis including such license for the conduct of business.

PUBLIC ACCOMMODATIONS
Restaurants—Delaware

Sub #1 to Ordinance 61-013 of the City Council of Wilmington, Delaware, approved by the mayor on June 2, 1961, prohibits persons licensed to sell food for consumption on the premises from refusing to serve any person because of race, color, or religion.

AN ORDINANCE to amend Ordinance No. 42 entitled "An Ordinance Providing for the Payment Collection & Issuance of Licenses for Carrying on or Engaging in Any Business, Profession, Pursuit or Calling Operated, Carried on or Engaged in Within the Corporate Limits of the City of Wilmington, as Amended by Ordinances Nos. 46, 53, 58, 67, 68 and 61-007, approved by the Mayor on March 20, 1959, May 25, 1959, June 18, 1959, July 20, 1959, July 24, 1959, and April 14, 1961, respectively by amending Section 21 thereof by adding a new subparagraph, to be known as subparagraph (e), with the running head of "Discrimination"

Be it ordained by "The Council" of the Mayor and Council of Wilmington (two-thirds of all the members elected to "The Council" concurring therein) as follows:

That Section 21 of Ordinance No. 42, entitled "DELINQUENCIES–PENALTIES" be and the same is hereby amended by adding a new subparagraph thereto, to read as follows:

(e) Discrimination. No person, as defined by this Ordinance, holding a license pursuant to the provisions of this Ordinance and specifically pursuant to the provisions of Section 5 RR of this Ordinance as a restaurant, cafe, soda fountain, hotel dining room, or other place where food is prepared and sold for consumption on the premises shall discriminate against any person in the sale of food for consumption on the premises and in the rendering of services ordinarily incident thereto on the basis of his race, color, or religion, and specifically shall not refuse to serve any person because of his race, color, or religion. Each license issued by the City License Bureau pursuant to the provisions of this Ordinance and specifically pursuant to the provisions of Section 5 RR of this Ordinance shall contain the following language which shall be set forth on the back of each license issued in addition to any other language required to be set forth on the back of the license by any other provision of this Ordinance, viz.:

> "The holder of this license covenants, warrants and agrees by the acceptance of this license that in the conduct of his business he will strictly comply with all the provisions of the ordinances of the City of Wilmington and this ordinance and specifically will strictly comply with the provisions of Section 21 (e) of this Ordinance prohibiting discrimination against any person because of his race, color, or religion."

Every person, as defined by this Ordinance, applying for a license pursuant to the provisions of this Ordinance and specifically pursuant to the provisions of Section 5 RR of this Ordinance, shall file an affidavit with the application for the license required by this Ordinance, which affidavit shall be a part of the application for the license, stating that said person, as defined by this Ordinance, will strictly comply with all the provisions of the Ordinances of the City of Wilmington and of this Ordinance and specifically with the provisions of Section 21 (e) of this Ordinance prohibiting discrimination against any person on the basis of race, color, or religion.

Every person, as defined by this Ordinance, violating any provision of this Section shall be deemed guilty of a misdemeanor, and upon conviction thereof before the Municipal Court for the City of Wilmington, shall be punished by a fine of not less than Fifty Dollars nor more than Three Hundred Dollars for each such offense, and in the event of default in the payment of the fine defendant shall be punished by imprisonment for a term not exceeding thirty days.

PUBLIC ACCOMMODATIONS, HOUSING
Discrimination—New Hampshire

Chapter 219 of the 1961 session of the New Hampshire legislature, approved by the governor on June 30, 1961, prohibits discrimination in places of public accommodation and in the rental of housing in buildings containing more than one dwelling unit. Conviction of violation of this provision is not to be used as evidence in a civil action for damages, and punishment is set at a $10 to $100 fine for each offense.

AN ACT to prohibit discrimination in places of public accommodation.

Be it Enacted by the Senate and House of Representatives in General Court convened:

219:1 Places of Public Accommodation. Amend RSA 354:1 by striking out said section and inserting in place thereof the following: 354:1 Discrimination. No person shall directly or indirectly discriminate against persons of any race, creed, color, ancestry or national origin, as such, in the matter of board, lodging or accommodation, privilege or convenience offered to the general public at places of public accommodation or in the matter of rental or occupancy of a dwelling in a building containing more than one dwelling.

219:2 Limitation. Amend RSA chapter 354 by inserting after section 4 thereof the following new section: 354:5 Civil Actions. Conviction of violation of the prohibitions contained in section 1 above may not be used as evidence in a civil action for damages or as a basis for such a civil action in any manner whatsoever.

219:3 Penalty. Amend RSA 354:4 by striking out in lines two and three thereof the words "or imprisoned not less than thirty nor more than ninety days," so that section as amended shall read as follows: 354:4 Penalty. Whoever violates any provisions of sections 1 or 3 shall be fined not less than ten nor more than one hundred dollars.

219:4 Takes Effect. This act shall take effect sixty days after its passage.

Speaker of the House of Representatives
President of the Senate
Governor

ADMINISTRATIVE AGENCIES

EMPLOYMENT
Discrimination—Federal Contracts

The President's Committee on Equal Employment Opportunity (see 6 Race Rel. L. Rep. 9, 377, _____) and the Lockheed Aircraft Corporation have agreed on a program of promoting equality of employment opportunity at Lockheed's manufacturing facilities. In a joint statement issued May 25, 1961, the company announced it would undertake: (1) to keep its staff informed of the company policy of non-discrimination; (2) to recruit aggressively more qualified minority group candidates for all classifications of employment; (3) to advise placement groups in colleges that its employment policy is non-discriminatory; (4) to re-evaluate salaried job openings for possible hiring of minority group candidates; (5) to hire teachers for summer replacement jobs; (6) to support minority group candidates for apprenticeship and other training programs; (7) to review layoff and transfer policies with a view to guarding against discrimination; and (8) to maintain eating, restroom and recreation facilities on a non-segregated basis. The President's committee undertook: (1) to request Labor Department assistance in job referrals to insure against discrimination; (2) to seek the close cooperation of other affected governmental agencies; and (3) to work with the labor unions involved in problems connected with apprenticeships and seniority rights.

EMPLOYMENT
Discrimination—Federal Contracts; Federal Workers

The President's Committee on Equal Employment Opportunity has issued regulations designed to implement the President's Executive Order 10925 [6 Race Rel. L. Rep. 9, 377 (1961)] which prohibits discrimination in government employment. Under revised Chapter IV, relating to government employees, heads of departments and agencies are required to set up complaint procedures, designate employment policy officers, and promulgate information on the President's order. Under new Chapter 60, relating to employment obligations of government contractors, procedures are set up for investigation of complaints, negotiation of apparently valid complaints, decision within the department or agency, and review by the President's committee.

Chapter IV—The President's Committee on Equal Employment Opportunity

Part 401—*Nondiscrimination in Government Employment*

Executive Order 10925 of March 6, 1961 (26 F.R. 1977), establishes the President's Committee on Equal Employment Opportunity, and abolishes the President's Committee on Government Employment Policy created by Executive Order 10590 of January 18, 1955 (20 F.R. 409), as amended by Executive Order 10722 of August 5, 1957 (22 F.R. 6287). Executive Order 10925, however, reaffirms the policy expressed in Executive Order 10590 with respect to the exclusion and prohibition of discrimination against any

employee or applicant for employment in the Federal Government because of race, color, religion, or national origin and that Order transfers the powers, functions, and duties of the Committee on Government Employment Policy to the Committee on Equal Employment Opportunity.

Executive Order 10925 also directs all executive departments and agencies to study government employment practices and to submit reports and recommendations to accomplish the objectives of the Order to the Executive Vice Chairman of the President's Committee on Equal Employment Opportunity. The regulations published herein are intended to provide a means of effectuating the policy expressed in Executive Order 10590 and reaffirmed in Executive Order 10925.

Therefore, pursuant to section 306 of Executive Order 10925 of March 6, 1961 (26 F.R. 1977), the present caption of Chapter IV of Title 5, Code of Federal Regulations, and all of Part 401 of that Chapter are hereby deleted. A revised Chapter IV is hereby substituted therefor, to read as follows:

Subpart A—Purpose and Scope of Regulations, Definitions, Powers and Duties

Sec.

Subpart B—Complaint Procedure

Subpart C—Ancillary Matters

Authority: §§ 401.1 to 401.31 issued under sec. 306, E.O. 10925, 26 F.R. 1977. Interpret or apply E.O. 10590, as amended, 20 F.R. 409, 3 CFR, 1955 Supp.

Subpart A—Purpose and Scope of Regulations, Definitions, and Duties

§ 401.1 Purpose and scope.

The purpose of the regulations in this part is to implement Part II of Executive Order 10925, which reaffirms the policy expressed in Executive Order No. 10590 of January 18, 1955 (20 F.R. 409), with respect to the exclusion and prohibition of discrimination against any employee or applicant for employment in the Federal Government because of race, color, religion, or national origin. The regulations apply to all executive departments and agencies of the government of the United States wherever located and to all positions in such departments and agencies whether or not in competitive service, except aliens employed outside the limits of the United States. The regulations in this Part 401 also apply to cases pending under Executive Order 10590, as amended, and the regulations promulgated thereunder.

§ 401.2 Definitions.

(a) "Chairman" means Chairman of the committee.

(b) "Committee" means the President's Committee on Equal Employment Opportunity.

(c) "Executive Vice Chairman" means the Executive Vice Chairman of the Committee.

(d) "Order" means Executive Order 10925 of March 6, 1961 (26 F.R. 1977).

§ 401.3 Duties of the head of department or agency.

(a) *Promulgation of regulations.* Each executive department or agency may prescribe, subject to the prior approval of the Executive Vice Chairman, regulations not inconsistent with those in this part for the administration of employment policies under Part II of Executive Order 10925 that will insure a complainant an appeal to the proper authorities within his department or agency, a fair hearing and a just disposition of his case. The regulations shall in all cases provide that, subsequent to the proposed

recommendations of the Employment Policy Officer and prior to the final decision of the department or agency, the complainant's case may be referred to the Executive Vice Chairman for study and recommendations as provided in § 401.19.

(b) *Designation of Employment Policy Officer and Deputy Employment Policy Officers.* The head of each department or agency shall designate an Employment Policy Officer to carry out the duties prescribed in § 401.4. The head of each department or agency or the Employment Policy Officer may also designate, when appropriate, Deputy Employment Policy Officers for each of the field offices and major subdivisions of the department or agency to assist the Employment Policy Officer. The positions of the Employment Policy Officer and Deputy Employment Policy Officer shall be established outside the division handling the personnel matters of the department or agency concerned unless prior approval is received from the Executive Vice Chairman. In the discharge of his functions, each Employment Policy Officer shall be under the immediate supervision of the head of the department or agency. The name of each Employment Policy Officer, his official title, address and telephone number, and any changes made in his designation, shall be furnished to the Executive Vice Chairman.

(c) *Dissemination of information.* A copy of the regulations prescribed under paragraph (a) of this section by the agency shall be posted on all employee bulletin boards and all bulletin boards which are used to announce Federal examinations and job opportunities in each department or agency; where bulletin boards are not used the regulations will be made available to all personnel. Similar publication shall be made of the name and address of the Employment Policy Officer and that of any Deputy Employment Policy Officers in the field offices or subdivisions serviced by them. Information concerning the department or agency nondiscrimination policy and procedures shall be published at least annually in any employee bulletins or newsletters that are issued.

(d) *Processing of complaints; time limitation.* Within 30 days from receipt of a complaint by the agency or within such additional time as may be allowed by the Executive Vice Chairman for good cause shown, the agency shall process the complaint and submit to the Executive Vice Chairman the report on disposition of the complaint required by § 401.31. Where the complainant requests a hearing under the provisions of § 401.19, the report on the disposition of the complaint may be submitted to the Executive Vice Chairman within 60 days after the receipt thereof.

§ 401.4 Duties of each Employment Policy Officer.

Each Employment Policy Officer shall:

(a) Advise the head of his department or agency with respect to the preparation of regulations, reports, and other matters dealing with the exclusion and prohibition of discrimination under the Order.

(b) Process complaints of alleged discrimination in personnel matters within his department or agency, and make recommendations to appropriate administrative officials for such corrective measures as he may deem necessary.

(c) Appraise the personnel operations of the department or agency at regular intervals to assure their continuing conformity to the policy expressed in the Order of excluding and prohibiting discrimination.

§ 401.5 Duties of the Civil Service Commission.

The Civil Service Commission shall issue such regulations as may be necessary to implement Part II of the Order.

Subpart B—Complaint Procedure

§ 401.15 Who may file.

Any aggrieved Federal employee or qualified applicant for Federal employment who believes he has been discriminated against because of race, creed, color or national origin may file a written signed complaint within 90 days from the date of the alleged discrimination, unless such time is extended by the agency or the Executive Vice Chairman for good cause shown. The complaint may be submitted by an authorized representative of the aggrieved individual.

§ 401.16 Where to file.

Complaints may be filed with the Employment Policy Officer or Deputy Employment Policy Officer, or with the Committee. Those filed with the Committee may be referred to the appropriate Employment Policy Officer for consideration, or may be processed in accordance with § 401.22. Where complaints are filed with the Employment Policy Officer or Deputy Employment Policy Of-

ficer, he shall transmit a copy of the complaint to the Executive Vice Chairman.

§ 401.17 Investigation.

The Employment Policy Officer shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record, including an adequate transcript or agreed summary of any hearing held under § 401.19, sufficient to dispose of all relevant issues. Whenever necessary or appropriate for a full development of the case, the investigation shall include an appraisal of employment practices in the organizational segment or unit in which the alleged discrimination occurred. In those instances where no discrimination is found, the complainant shall be advised of such finding, of the results of the investigation, and of his right to secure a review by the Executive Vice Chairman, as provided in § 401.21.

§ 401.18 Negotiation and settlement.

After completion of the investigation, if the Employment Policy Officer or the Deputy Employment Policy Officer believes there is sufficient justification for the complaint to support an effort to dispose of the matter informally, an attempt should be made to resolve the matter by informal means.

§ 401.19 Opportunity for hearing and review.

In any case not disposed of by informal means, the complainant shall be afforded an opportunity for an oral hearing before the Employment Policy Officer, Deputy Employment Policy Officer, or someone designated by either of them, at a convenient time and place. At such hearing, the agency shall produce any witnesses under its jurisdiction, upon a showing satisfactory to the hearing officer of reasonable necessity therefor, and the rights of confrontation and of cross-examination (insofar as may be necessary for a development of the facts), shall be preserved. Any requests for the attendance of necessary witnesses shall be made in writing by the complainant at least 10 days prior to the date of the hearing. The complainant shall have the right to inspect any investigative report except where the Executive Vice Chairman shall determine that any report or portions thereof shall not be disclosed for reasons of national security. The hearing shall be informal and the hearing officer shall make his proposed findings and recommended conclusions upon the basis of the record before him. Where a complainant fails to appear without good cause shown or fails within 60 days to furnish requested information or to otherwise process his complaint, such case may be closed. The head of the department or agency or the Employment Officer may refer cases to the Executive Vice Chairman for study and recommendation after the Employment Policy Officer has formulated his findings and recommendations and prior to any decision by the head of the department or agency or his designated representative.

§ 401.20 Final decision by head of department or agency.

The head of the department or agency, or his designated representative, shall make the final decision in the disposition of the case. Where the head of the department or agency, or his designated representative, has referred the case to the Executive Vice Chairman for review and advisory opinion, such final decision may be made only after receipt of the recommendations of the Executive Vice Chairman. Further, such final decisions shall be reconsidered whenever reconsideration is recommended or ordered by the Executive Vice Chairman under paragraph (b) of § 401.21.

§ 401.21 Review of cases by Executive Vice Chairman.

(a) The Executive Vice Chairman shall accept for review any case coming within the purview of Part II of Executive Order 10925, upon the specific request of the complainant made to the Employment Policy Officer of the departments or agency concerned. Such request must be made by the complainant within 30 days of the date of final action by the agency, unless the Executive Vice Chairman shall waive such time limitation upon good cause shown.

(b) The Executive Vice Chairman may review any case reported to him under § 401.31, and may remand the case to the department or agency for reconsideration.

(c) In connection with his review, the Executive Vice Chairman may secure such additional information, hold such hearings, make such findings and issue such recommendations and orders, as may be necessary or appropriate to achieve the purposes of Part II of the Order.

§ 401.22 Processing of complaints by Executive Vice Chairman.

The Executive Vice Chairman may process

complaints filed with him or over which he has assumed jurisdiction under § 401.23. When the Executive Vice Chairman processes complaints filed with him or assumes jurisdiction, he may conduct such investigations, hold such hearings, make such findings, and issue such recommendations and orders as may be necessary or appropriate to achieve the purposes of Part II of the Order.

§ 401.23 Assumption of jurisdiction by Executive Vice Chairman over cases before a department or agency.

The Executive Vice Chairman may inquire into the status of any case pending before a department or agency, and, where he considers it necessary or appropriate in the achievement of the purposes of Part II of the Order, he may assume jurisdiction of the case and proceed as provided in § 401.22.

Subpart C—Ancillary Matters

§ 401.30 Right to counsel.

Parties to proceedings under this part shall have the right to be accompanied, represented, and advised by counsel, or by other qualified representative.

§ 401.31 Report of disposition of complaints.

Each department or agency shall submit to the Executive Vice Chairman a report of the final disposition of each complaint processed by it. The report shall contain the following:

(a) A copy of the complete case record, if requested by the Executive Vice Chairman.

(b) A summary of the complete case record, which shall include the following:

(1) The name and address of the complainant.

(2) The date on which the complaint was filed with or referred to the agency, and, where the complaint was filed with the agency, the name and title of the officer with whom it was filed.

(3) A summary of the complaint indicating the specific type or types of discrimination alleged.

(4) A summary of the results of any appraisal of employment practices and the significant facts disclosed by the investigation and any hearing.

(5) A statement describing disposition of the complaint. If the complaint was withdrawn, the reason for withdrawal should be included.

(6) The date of disposition of the complaint.

Effective date. Because the requirements of this chapter concern personnel matters excepted from the provisions of section 4 of the Administrative Procedure Act and because of the desirability of prompt implementation of the provisions of Executive Order 10925, this chapter shall become effective upon filing with the Office of the Federal Register.

Signed at Washington, D.C., this 20th day of July 1961.

Jerry R. Holleman,
Executive Vice Chairman.

Title 41—Public Contracts

CHAPTER 60—THE PRESIDENT'S COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY

Part 60—1—Obligations of Government Contractors and Subcontractors

On June 9, 1961, notice was published in the Federal Register (26 F.R.5184) of proposed regulations relating to the promotion and insurance of equal employment opportunity on public contracts for all qualified persons without regard to race, creed, color, or national origin.

Interested persons were given an opportunity to submit written and oral data, views, and arguments concerning the proposal. After considering carefully all relevant matter that was presented and after making some changes upon the basis of such matter relating principally to exemptions from the regulations, the filing of compliance reports, and provisions for notice and hearing in enforcement actions, the President's Committee on Equal Employment Opportunity hereby amends Title 41 of the Code of Federal Regulations by adding thereto a new Chapter 60, which reads as follows:

Subpart A—Preliminary Matters; Contract Agreements; Exemptions; Compliance Reports

Sec.

Sec.

AUTHORITY: § § 60–1.1 to 60–1.65 issued under sec. 306, E.O. 10925, 26 F.R. 1977.

Subpart A–Preliminary Matters; Contract Agreements; Compliance Reports

§ 60–1.1 Purpose and application.

The purpose of the regulations in this part is to achieve the aims of Part III of Executive Order 10925 for the promotion and insuring of equal opportunity for all qualified persons, without regard to race, color, creed, or national origin, employed or seeking employment on government contracts. The regulations apply to all contracting agencies and contractors and subcontractors who perform government contracts, or work in connection therewith to the extent set forth in this part. The rights and remedies of the government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Committee of powers not herein specifically set forth but granted to it by the Order.

§ 60–1.2 Definitions.

(a) "Committee" means the President's Committee on Equal Employment Opportunity.

(b) "Chairman" means the Chairman of the Committee.

(c) "Vice Chairman" mean the Vice Chairman of the Committee.

(d) "Executive Vice Chairman" means the Executive Vice Chairman of the Committee.

(e) "Order" means Executive Order 10925 of March 6, 1961 (26 F.R. 1977).

(f) "Contract" means any binding legal relationship between the government and a contractor for supplies or services, including construction, or for the use of government property, in which the parties, respectively, do not stand in the relationship of employer and employee.

(g) "Contract modification" means any written alteration in the terms and conditions of an existing contract accomplished by bilateral action of the parties to the contract, including such bilateral actions as supplemental agreements and amendments.

(h) "Subcontract or purchase order" mean, respectively, any contract made or purchase order executed with a contractor or subcontractor where a material part of the supplies or services covered by such contract or purchase order is being obtained for use in the performance of any contract subject to the Order.

(i) "Prime contractor" means any contractor holding a contract with the government.

(j) "First-tier subcontractor" means any contractor holding a contract with a government prime contractor calling for supplies or services required for the performance of a government prime contract.

(k) "Contracting agency" means any department (including the Departments of the Army, the Navy, and the Air Force), agency and establishment in the executive branch of the government, including any wholly-owned government corporation, which enters into contracts.

(l) "Rules, regulations and relevant orders" of the Committee as used in paragraph 4 of the contract clause contained in section 301 of the Order mean rules, regulations and relevant orders issued pursuant to the Order and in effect at the time the particular contract or contract modification subject to the Order was entered into.

§ 60–1.3 Contract agreements; exemptions.

(a) *Requirements of the Order.* Each contracting agency shall include in each of its contracts or contract modifications the nondiscrimination provisions of section 301 of the Order unless the contract is exempt in accordance with the provisions of paragraph (b) of this section. Each contractor or first-tier subcontractor shall include paragraphs 1 through 6 of the contract clauses contained in section 301 of the Order in every subcontract or purchase order made in connection with the performance of the government contract, so that the provisions of section 301 will be binding upon each subcontractor or vendor, with whom the contractor or first-tier subcontractor deals. Such necessary modifications in language may be made as shall be appropriate to identify properly the parties and their undertakings. Subcontractors below the first-tier shall not be required to insert the nondiscrimination provisions of section 301 of the Order in any contract which they may make in connection with the performance of a government contract except upon special order of the contracting agency or the Executive Vice Chairman. Subcontract or purchase orders may incorporate by reference the nondiscrimination provisions of section 301 of the Order.

(b) *Exemptions*—(1) *Specific contracts, subcontracts, or purchase orders.* The Executive Vice Chairman may exempt a contracting agency from requiring the inclusion of the contract provisions set forth in section 301 of the Order in any specific contract, subcontract, or purchase order when he deems that special circumstances in the national interest so require. Request for such exemptions may be submitted in accordance with § 60–1.62.

(2) *Transactions of $10,000 or under.* Contracts, subcontracts, purchase orders, and other transactions not exceeding $10,000, other than government bills of lading, are exempt from the requirements of section 301 of the Order.

(3) *Combinations of subcontracts.* Any combination of subcontracts by a subcontractor under the same principal contract, none of which exceed $10,000 or in the aggregate exceed $50,000, shall be exempt from the requirement of paragraph 5 of the contract clauses provided for in section 301 of the Order as implemented by § 60–1.5, which provides for the submission of compliance reports under section 302 of the Order.

(4) *Government bills of lading.* Government bills of lading in any amount are subject to the Order, and the nondiscrimination provisions may be incorporated therein by reference. When acting pursuant to such bills of lading, carriers shall be exempt from complying with paragraphs 3 through 7 of the contract clauses contained in section 301 of the Order unless otherwise specifically ordered by the contracting agency or the Executive Vice Chairman.

(5) *Contracts outside the United States.* Contracts, subcontracts, purchase orders and other transactions are exempt from the requirements of section 301 of the Order where work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved. The provisions of section 301 of the Order shall nevertheless be applicable to the extent that work pursuant to such contracts is done within the limits of the United States.

(6) *Standard commercial supplies and raw materials.* Contracts, subcontracts, and purchase orders for standard commercial supplies or raw materials are exempt from the requirements of section 301 of the Order, except that the Executive Vice Chairman may from time to time by order provide that specified articles or raw materials shall be subject to the Executive Order and rules and regulations promulgated pursuant thereto, when he finds that the inclusion thereof is necessary or appropriate to achieve the purposes of the Order.

(7) *Withdrawal of exemption.* When any class of contracts, subcontracts, or purchase orders subject to the Order is exempted under this section, the Executive Vice Chairman may withdraw the exemption in the case of specific contracts, when in his judgment, the national interest does not require the exemption, and

when such action is necessary or appropriate to achieve the purposes of the Order.

(8) *Effect of exemption.* Notwithstanding the inclusion in any contract of the provisions set forth in section 301 of the Order, the contractor shall be exempt from compliance therewith if the contract containing such provisions of the Order is exempt under any exemption contained in the rules, regulations and relevant orders issued by the Committee.

(9) *Review of exemptions.* The Executive Vice Chairman shall report periodically to the Committee for its review any exemptions of a specific contract or class of contracts granted pursuant to these rules and regulations.

§ 60–1.4 Duties of contracting agency.

(a) *General responsibility.* The head of each contracting agency shall be primarily responsible for obtaining compliance with the contract provisions set forth in section 301 of the Order, the regulations in this part, and any orders of the Committee. Further, each contracting agency shall furnish the Committee such information and assistance as it may require in the performance of its functions under the Order.

(b) *Contracts Compliance Officers and Deputy Contracts Compliance Officers; designation; duties.* The head of each contracting agency shall appoint from among its personnel a Contracts Compliance Officer, who shall be subject to the immediate supervision of the head of the contracting agency for carrying out the responsibilities of the agency under this part. The head of the contracting agency or the Contracts Compliance Officer may also designate, when appropriate, Deputy Contracts Compliance Officers to assist the Contracts Compliance Officer in the performance of his duties. The name of each Contracts Compliance Officer and any Deputy Contracts Compliance Officers, their addresses, telephone numbers, and any changes made in their designation shall be furnished to the Executive Vice Chairman.

(c) *Regulations.* The head of each contracting agency may prescribe, subject to the prior approval of the Executive Vice Chairman, regulations not inconsistent with those in this part for the administration of the nondiscrimination provisions of Part III of the Order. Prior to receipt of the approval of the Executive Vice Chairman, as provided in this paragraph, current agency regulations relating to nondiscrimination in government procurement may be continued to the extent that they are not inconsistent with the regulations in this part and with Part III of the Order.

§ 60–1.5 Compliance reports.

(a) *Requirements for contractors and subcontractors*—(1) *General.* The contracting agency shall require each contractor having a contract containing the provisions prescribed in section 301 of the Order to file, and each contractor shall cause each of its first-tier subcontractors not exempted by § 60–1.3 to file, compliance reports with the contracting agency, which shall be subject to review by the Executive Vice Chairman upon request. The contractor's compliance report shall be filed within 30 days after the award of the contract and the contractor shall require that first-tier subcontractors' compliance reports be filed with the contractor within 30 days of the making of such first-tier subcontracts, and forwarded promptly by the contractor to the contracting agency, on forms prescribed by the Committee which may be obtained from the contracting agency. Among other things, the forms shall provide that whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or other representative of employees, information shall be furnished as to the labor union or other workers' representative's practices and polices affecting compliance, and in connection therewith, shall request the union or workers' representative for any necessary data within its possession. Where such information is within the exclusive possession of a labor union or other workers' representative and the labor union or other workers' representative shall fail or refuse to furnish such information, the contractor or subcontractor shall so certify in his report and shall set forth what efforts he has made to obtain such information. When such failure or refusal is certified, the contracting agency shall immediately advise the Executive Vice Chairman. Subsequent compliance reports shall be filed at such regular intervals as may be indicated upon the prescribed forms or at such other times as the Executive Vice Chairman may direct. The contracting agency, with the approval of the Executive Vice Chairman, may in appropriate cases, extend the time for the filing of compliance reports.

(2) *When required on other current contracts.* Whenever a contractor or subcontractor

is already currently engaged in the performance of any part or all of another contract with any contracting agency subject to the Order and these regulations, or has filed a compliance report within a current reporting period, the requirements of subparagraph (1) of this paragraph may be satisfied by the contractor or subcontractor filing a statement reciting the plants, facilities and activities to which the prior compliance report applies, and identifying by number and description the other contract or contracts under which compliance reports have already been and are being filed, or by filing a true copy or copies of compliance reports previously submitted (unless the contracting agency shall direct that more current compliance reports be filed), *provided, however,* that with regard to any such pre-existing compliance report, the contractor or subcontractor shall certify that such report continues to provide an accurate and current description of the employment practices and policies at all plants, facilities and activities of the contractor or subcontractor subject to the Order.

(b) *Requirements of bidders or prospective contractors*—(1) *Previous government contracts.* Each contracting agency shall require any bidder or prospective contractor, or any of their proposed subcontractors, to state as an initial part of the bid or negotiations of the contract whether it has participated in any previous contract subject to the provisions of section 301 of the Order. The agency may, or upon the direction of the Executive Vice Chairman, shall require the submission of a compliance report by any bidder or prospective contractor prior to the award of the contract upon which the contractor has bid. When a determination has been made to award a contract to a specific contractor, such contractor may be required, prior to award, to furnish the contracting agency with the names of its proposed subcontractors and to furnish such information regarding the employment policies and practices of such subcontractors as the contracting agency may require.

(2) *Union statement.* Each contracting agency may as a part of the bid or negotiation of the contract, or upon the direction of the Executive Vice Chairman, shall, direct any bidder, proposed contractor, or any of their proposed subcontractors to file a statement in writing (signed by an authorized officer or agent of any labor union or other workers' representative with which the bidder or prospective contractor, or subcontractor, deals or has reason to believe he will deal in connection with performance of the proposed contract), together with supporting information, to the effect that the said labor union's or other workers' representative's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the labor union or other workers' representative either will affirmatively cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of the Order or that it consents and agrees that recruitment, employment and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event the union or other workers' representative fails or refuses to execute such a statement, the bidder or prospective contractor shall so certify, and state what efforts have been made to secure such a statement. When such failure or refusal has been certified, the contracting agency shall immediately advise the Executive Vice Chairman.

§ 60–1.6 Compliance by labor unions.

(a) The Executive Vice Chairman shall use his best efforts, directly and through contracting agencies, contractors, subcontractors, state and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting agency or other representative of workers who is or may be engaged in work under government contracts to cooperate with, and to comply in the implementation of the purposes of the regulations and the Order.

(b) In order to effectuate the purposes of paragraph (a) of this section, the Executive Vice Chairman may hold hearings, public or private, with respect to the practices and policies of any such labor organization.

(c) The Executive Vice Chairman may also notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization which in his judgment has failed to cooperate with the Committee, contracting agencies, contractors, or subcontractors in carrying out the purposes of the regulations and the Order.

§ 60–1.7 Use of compliance reports.

The contracting agency and the Committee shall use the compliance reports only in connection with the administration of the Order.

Subpart B—General Enforcement; Complaint Procedure

§ 60–1.20 Compliance review by the contracting agency.

(a) *General.* The purpose of compliance reviews shall be to ascertain the extent to which the Order is being implemented by the creation of equal employment opportunity for all qualified persons in accordance with the national policy. They are not intended to interfere with the responsibilities of employers to determine the competence and qualifications of employees and applicants for employment. Both routine and special compliance reviews shall be conducted by the contracting agency to ascertain the extent to which contractors and subcontractors are complying with the Order, and to furnish information that may be useful to the contracting agency and the Committee in carrying out their functions under the Order. If the contractor has contracts with more than one contracting agency, the contracting agency having the predominant interest shall normally conduct compliance reviews. That contracting agency having the largest aggregate dollar value of contracts at the time of the filing of the most recent compliance report shall be deemed to have the predominant interest in any proceeding under this part.

(b) *Routine compliance review.* A routine compliance review consists of a general review of the practices of the contractor or subcontractor to ascertain compliance with the requirements of the Order. A routine compliance review shall be considered a normal part of contract administration.

(c) *Special compliance review.* A special compliance review consists of a comprehensive review of the employment practices of the contractor or subcontractor with respect to the requirements of the Order. Special compliance reviews shall be conducted by the Executive Vice Chairman; or the contracting agency (1) from time to time, (2) when special circumstances, including complaints which are processed under § 60–1.24, warrant, or (3) when requested by the Executive Vice Chairman. The contracting agency shall report the results of any special compliance review to the Executive Vice Chairman.

§ 60–1.21 Who may file complaints.

Any employee of any government contractor or subcontractor or applicant for employment with such contractor or subcontractor who believes himself to be aggrieved under the provisions of section 301 of the Order may, by himself or by an authorized representative, file in writing a complaint of alleged discrimination. Such complaint must be filed not later than 90 days from the date of the alleged discrimination, unless the time for filing is extended by the contracting agency or the Executive Vice Chairman upon good cause shown.

§ 60–1.22 Where to file.

Complaints may be filed with the contracting agency or with the Committee. Those filed with the Committee may be referred to the contracting agency for processing, or they may be processed in accordance with § 60–1.26. Where complaints are filed with the contracting agency, the Contracts Compliance Officer shall transmit a copy of the complaint to the Executive Vice Chairman within ten days after the receipt thereof and shall proceed with a prompt investigation of the complaint.

§ 60–1.23 Contents of complaint.

(a) The complaint should include the following information: The name and address (including telephone number) of the complainant; the name and address of the contractor or subcontractor committing the alleged discrimination; a description of the acts considered to be discriminatory; and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant.

(b) Where a complaint contains incomplete information, the contracting agency or the Executive Vice Chairman, (when acting pursuant to §60–1.26), shall seek promptly the needed information from the complainant. In the event such information is not furnished to the contracting agency or the Executive Vice Chairman within 60 days of the date of such request, the case may be closed.

§ 60–1.24 Processing of complaints by the contracting agency.

(a) *Investigation.* (1) The contracting agency shall institute a prompt investigation of each complaint filed with it or referred to it, and shall be responsible for developing a complete case record. The investigation should include, where appropriate, a review of the pertinent personnel practices and policies of the contractor or subcontractor, the circumstances under which the al-

leged discrimination occurred, and other factors relevant to a determination as to whether the contractor or subcontractor has complied with the nondiscrimination provisions of the contract.

(2) When a complaint is filed against a contractor or subcontractor who has contracts with more than one contracting agency, the contracting agency having the predominant interest in such government contracts shall normally conduct the investigation and make such findings and determinations as shall be appropriate for the administration of the Order.

(b) *Resolution of complaint.* (1) If the investigation by the contracting agency shows no violation of the nondiscrimination provisions, the contracting agency shall so inform the Committee. The Executive Vice Chairman shall review the findings and upon concurrence therewith he shall so advise the contracting agency, which shall in turn notify the complainant and the appropriate contractors and subcontractors, and the case shall be closed. If upon review, the Executive Vice Chairman does not concur with the findings of the contracting agency, he may request further investigation by the contracting agency or may undertake such investigations by the Committee as he may deem appropriate.

(2) If the investigation indicates the existence of an apparent violation of the nondiscrimination provisions, the matter should be resolved by informal means whenever possible.

(3) If a case in which the investigation has shown apparent discrimination is not resolved by informal means, the contracting agency may afford the contractor or subcontractor complained against an opportunity for a hearing before reporting its findings and recommendations to the Executive Vice Chairman, as provided in paragraph (c) of this section; *Provided, however,* That whenever ineligibility for any government contract (i.e. debarment) of the contractor or subcontractor may be proposed by a contracting agency, such contractor or subcontractor shall be afforded and opportunity for a hearing under § 60–1.27 before the head of the contracting agency or his authorized representative: *Provided, further,* That the contracting agency shall not impose any sanction or penalty under section 312 of the Order, except under subsection (d) of that section relating to contract termination, without the prior approval of the Committee; *Provided, further,* That no case shall be referred to the Department of Justice as provided in section 312(b) of the Order and no contract shall be terminated in whole or in part under section 312 (d) of the Order without compliance with § 60–1.29; *And provided, further,* When a contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of a contracting agency or the Executive Vice Chairman and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor, be afforded an opportunity for a hearing and review of the alleged erroneous action by the contracting agency or the Executive Vice Chairman, as the case may be.

(c) *Report to the Executive Vice Chairman.* Within 30 days after the completion of the case processing, the head of the contracting agency or his authorized representative shall submit to the Executive Vice Chairman the case record and a summary report containing the following information:

(1) Name and address of the complainant;

(2) Brief summary of findings;

(3) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed under subsection (d) of section 312 of the Order, or, whenever appropriate the recommended corrective action and sanctions or penalties.

§ 60–1.25 Assumption of jurisdiction by the Executive Vice Chairman over cases before contracting agency.

The Executive Vice Chairman may inquire into the status of any case pending before a contracting agency, and, where he considers it necessary or appropriate to the achievement of the purposes of Part III of the Order he may assume jurisdiction over the case and proceed as provided in § 60–1.26.

§ 60–1.26 Processing of complaints by the Executive Vice Chairman.

(a) The Executive Vice Chairman may process complaints filed with him or over which he assumes jurisdiction under § 60–1.25. Whenever the Executive Vice Chairman processes complaints filed with him or he assumes jurisdiction, he may conduct, or have conducted, such investigations, hold such hearings, make such findings, and issue such recommendations and orders as may be necessary or appropriate to achieve the purposes of Part III of the Order: *Provided, however,* That whenever contract ineligibility of the contractor or subcontractor may

be proposed, such contractor or subcontractor shall be afforded an opportunity for a hearing under § 60–1.27 before the head of the contracting agency or his authorized representative, or before a panel of the Committee: *And provided, further,* That no case shall be referred to the Department of Justice as provided in section 312(b) of the Order and no contract shall be terminated in whole or in part under section 312(d) of the Order without compliance with § 60–1.29.

(b) The Executive Vice Chairman shall promptly notify the contracting agency of any corrective action to be taken or any sanctions to be imposed by the contracting agency. The contracting agency shall take such action, and report the results thereof to the Chairman within the time specified in individual cases.

§ 60–1.27 Notice and hearings.

(a) *Notice.* Whenever a hearing is to be held pursuant to Subpart B of this part, reasonable notice of such hearing shall be given by registered mail, return receipt requested, to the contractor or subcontractor complained against. Such notice shall include (1) a convenient time and place of hearing, (2) a statement of the provisions of the Order and regulations pursuant to which the hearing is to be held, and (3) a concise statement of the matters pursuant to which the action forming the basis of the hearing has been taken or is proposed to be taken.

(b) *Hearings*—(1) *In general.* The Executive Vice Chairman, the head of the contracting agency or such other official or officials designated as hearing officer or officers shall regulate the course of the hearing. Hearings shall be informally conducted. Every party shall have the right to counsel, and a fair opportunity to present his case or defense including such cross-examination as may be appropriate in the circumstances. Hearing officers shall make their proposed findings and recommended conclusions upon the basis of the record before them.

(2) *Contract ineligibility cases.* When hearings are held pursuant to section 310 (b) of the Order to declare a contractor or subcontractor ineligible for further government contracts, the procedures provided in subparagraph (1) of this paragraph shall be followed except as hereinafter set forth.

(i) *Notice.* Before any determination is made by the Committee or the contracting agency to declare any contractor or suvcontractor ineligible for further contracts under sections 301 and 312 of the Order, a notice of the proposed determination in writing and signed by the Executive Vice Chairman or the head of the contracting agency, or his authorized representative, as the case may be, shall be sent to the last known address of the contractor or subcontractor by registered mail, return receipt requested.

(ii) *Hearing request.* Whenever a contractor or subcontractor has been notified by a contracting agency of a proposed determination of contract ineligibility under the Order, such contractor or subcontractor shall be entitled to request an opportunity to be heard by the contracting agency. When such notice is received from the Executive Vice Chairman, a request for an opportunity to be heard may be made to the Committee. The letter to the Executive Vice Chairman or the head of the contracting agency, or his authorized representative, as the case may be, may include a request for a written statement specifying charges in reasonable detail. The request for an opportunity to be heard shall be made within ten days from the date of the receipt of notice of the proposed determination. If at the end of such ten-day period, no request has been received, the Executive Vice Chairman or the head of the contracting agency, or his authorized representative, may assume that an opportunity to be heard is not desired, and the Executive Vice Chairman may enter an order declaring such contractor or subcontractor ineligible for further government contracts, or extension or other modifications of existing contracts until such contractor or subcontractor shall have satisfied the Committee that he has established and will carry out personnel and employment policies in compliance with the provisions of the Order.

(iii) *Hearing, time, and place.* Upon receipt of a request for an opportunity to be heard, the Executive Vice Chairman or the head of the contracting agency, or his authorized representative shall arrange a timely hearing. The hearing shall be conducted by the head of the contracting agency or his authorized representative or by a panel of the Committee consisting of not less than three members thereof appointed by the Chairman or Vice Chairman of the Committee. When the hearing is conducted by the contracting agency, no decision by the head of the contracting agency, or his authorized representative, shall be final without the prior approval of a panel of the Committee.

§ 60–1.28 Reinstatement of ineligible contractors or subcontractors.

Any contractor or subcontractor declared ineligible for further government contracts under the Order may request reinstatement in a letter directed to the Executive Vice Chairman. In connection with the reinstatement proceeding, the contractor or subcontractor shall be required to show that it has now complied with the Order or that it has a program of compliance acceptable to the Executive Vice Chairman.

§ 60–1.29 Opportunity to achieve compliance before referrals to the Department of Justice or contract termination.

No cases shall be referred to the Department of Justice under section 312(b) of the Order and no contract shall be terminated in whole or in part under section 312(d) of the Order until the expiration of 10 days (unless a longer period is fixed by the contracting agency with the approval of the Executive Vice Chairman) from the mailing of notice of such proposed referral or contract termination by the contracting agency to the contractor or subcontractor involved, affording him an opportunity to comply with the provisions of the Order. When the case involves a proposed referral to the Department of Justice, the mailing of notice shall be after receipt from the Executive Vice Chairman of approval of such proposed action. In addition, the contracting agency shall make reasonable efforts to persuade the contractor to comply with the provisions of the Order and to take such corrective action as may be appropriate.

§ 60–1.30 Notification of Comptroller General in cases of contract ineligibility or contract termination.

Whenever a contract is terminated or whenever a contractor is declared ineligible from receiving further contracts because of noncompliance with the nondiscrimination provisions, the Executive Vice Chairman shall notify the Comptroller General of the United States.

§ 60–1.31 Contract ineligibility list.

The Executive Vice Chairman shall distribute periodically a list to all executive departments and agencies giving the names of contractors or subcontractors who have been declared ineligible under these regulations and the Order. The Executive Vice Chairman may also publish such a list together with a list of those contractors or subcontractors who may have reestablished their eligibility in such form and in such places as he may deem appropriate.

Subpart C—Certificates of Merit

§ 60–1.40 By the Committee on its own initiative.

The Committee acting through the Chairman or Vice Chairman may award United States Government Certificates of Merit to employers or employee organizations which are or may hereafter be engaged in work under government contracts, if the Committee is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the employee organization conform to the purposes and provisions of the Order.

§ 60–1.41 By the Executive Vice Chairman upon agency recommendation.

The Committee, acting through the Executive Vice Chairman, may award a United States Government Certificate of Merit upon the recommendation of a contracting agency. The recommendation should include a statement in sufficient detail to inform the Executive Vice Chairman of the basis for the proposed award.

§ 60–1.42 Benefits.

A United States Government Certificate of Merit shall entitle the recipient employer or employee organization to an exemption from the submission of the reports otherwise required by section 302 of the Order and the regulations. Holders of Certificates of Merit should notify each agency with whom they may seek contracts of their status and should clearly identify the Certificate by number or otherwise.

§ 60–1.43 Suspension or revocation.

The Committee acting through the Chairman or Vice Chairman may at any time review the continued entitlement of any employer or employee organization to a United States Government Certificate of Merit, and may suspend or revoke in the public interest the Certificate if the holder thereof, in the judgment of the Executive Vice Chairman, is no longer in compliance with the provisions of the regulations and those of the Order. The Executive Vice Chairman shall notify all contracting agencies of such suspension or revocation of the Certificate of Merit.

Subpart D—Ancillary Matters

§ 60–1.60 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a contractor or subcontractor, the requirements of paragraph (2) of the contract provisions contained in section 301 of the Order shall be satisfied whenever the contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Committee. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, creed, color, or national origin;

(d) Uses single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer".

§ 60–1.61 Access to records of employment.

Each contractor and subcontractor shall permit access during normal business hours to his books, records, and accounts pertinent to compliance with the Order, and all rules and regulations promulgated pursuant thereto, by the contracting agency, the Committee, the Executive Vice Chairman, and the Secretary of Labor for purposes of investigation to ascertain compliance with the rules, regulations, and orders of the Committee. Information obtained in this manner shall be used only in connection with the administration of the Order.

§ 60–1.62 Requests for exemptions.

The head of the contracting agency may request an exemption of any specific contract, subcontract, or purchase order from the requirements of the provisions of section 301 of the Order. Any such request shall be directed to the Executive Vice Chairman, who shall rule upon the request in accordance with paragraph (b) of § 60–1.3.

§ 60–1.63 Rulings and interpretations.

(a) All questions arising in any contracting agency relating to the application and interpretation of the regulations contained in this part and in the Order shall be referred to the Executive Vice Chairman for appropriate ruling or interpretation. The rulings and interpretations of the Executive Vice Chairman, unless and until modified or revoked, shall be authoritative.

(b) Any bidder or prospective contractor, and any contractor, subcontractor or vendor holding a contract, subcontract or purchase order subject to the Order, who owns, operates or controls, one or more plants or facilities in addition to those engaged in the performance of work upon such contract, subcontract or purchase order, may file with the Executive Vice Chairman a request for a ruling as to the applicability of the Order to any plant or facility which he deems to be outside the scope of the Order; and the Executive Vice Chairman may rule that the Order does not apply to any such plant or facility if he finds that such plant or facility is in all respects separate and distinct from those activities of the contractor connected with the performance of the contract and that a ruling to that effect will not interfere with or impede the effectuation of the purposes of the Order and of the rules and regulations, or, through the contracting agency, may similarly submit for clarification and determination other questions concerning the applicability of the Order to such contract, subcontract or purchase order.

§ 60–1.64 Reports to the Committee.

The Executive Vice Chairman shall make monthly reports to the Committee and such other reports as may be requested by the Chairman or Vice Chairman of the Committee.

§ 60–1.65 Existing contracts, subcontracts, or purchase orders.

All contracts, subcontracts or purchase orders in effect prior to the Order and not modified, as provided in § 60–1.3, shall be administered in accordance with the nondiscrimination provisions of the prior applicable Executive Orders. Complaints received by, and violations coming to the attention of, contracting agencies, pursuant to the nondiscrimination contract clauses contained in such contracts, subcontracts, or purchase orders and inserted therein in accordance with such prior Executive Orders, shall be reported to the Executive Vice Chairman. The

contracting agency shall, upon its own initiative, or upon the request of the Executive Vice Chairman, investigate such complaints or alleged violations and take such action as may be appropriate.

Effective date. Because the requirements of this chapter concern public contracts excepted from the provisions of section 4 of the Administrative Procedure Act and because of the desirability of prompt implementation of the provisions of Executive Order 10925, this chapter shall become effective upon filing with the Office of the Federal Register.

Signed at Washington, D.C., this 20th day of July 1961.

JERRY R. HOLLEMAN,
Executive Vice Chairman.

GOVERNMENTAL FACILITIES
Playgrounds—Virginia

The City Council of Alexandria, Virginia, has issued a policy statement to the effect that Negroes attending integrated schools are to be accepted without question in various Recreational Department playground programs at their schools. Recreational Department programs at playgrounds not a part of school grounds are to be open to all children in the neighborhood.

All Negro children attending integrated schools would be admitted without question to the various playground programs that take place at their schools.

Recreational Department playground programs in the City would accommodate all children who are students in the school at which the playground is located. All other playgrounds under direct control of the Recreation Department and not a part of school grounds would accept all children in the neighborhood, so long as they follow the directions of the playground supervisor.

HOUSING
Real Estate Brokers—New York

The State Department of New York state has added to the Rules and Regulations for Real Estate Agents a prohibition against the solicitation of real estate transactions on the ground of loss of value due to the present or prospective entry into the neighborhood of a person or persons of another race, religion, or ethnic origin.

Draft of Rule to be Added to the Real Estate Rules and Regulations.

No broker or salesman shall solicit the sale, lease, or the listing for sale or lease, of residential property on the ground of loss of value due to the present or prospective entry into the neighborhood of a person or persons of another race, religion, or ethnic origin, nor shall he distribute or cause to be distributed material, or make statements, designed to induce a residential property owner to sell or lease his property due to such change in neighborhood.

HOUSING
Real Estate Brokers—Pennsylvania

Section 15.11 of the Rules and Regulations of the State Real Estate Commission of Pennsylvania, as amended May 18, 1961, prohibits real estate brokers and salesmen from attempting to bring about "panic selling," which is defined as frequent efforts to sell residential real estate as a result of fear of a decline in value, when the fear is not based on facts relating to the intrinsic value of the property itself.

15.11 An attempt by a real estate broker or salesman to bring about panic selling, in order to profit from it, constitutes incompetency and bad faith within the meaning of the Act.

.1 "Panic selling" is hereby defined as frequent efforts to sell residential real estate in a particular neighborhood as a result of fear of a decline in real estate values, when the fear is not based on facts relating to the intrinsic value of the real estate itself.

.2 Proof of systematic solicitation of listings of sales shall be sufficient, but not conclusive, evidence of an attempt to bring about panic selling.

Comment: The Commission finds that certain brokers, in order to profit, have attempted to induce an abnormally high frequency of sales or leases of residential real estate by appeals to racial, religious or ethnic prejudices ("panic selling") and that in some cases such panic selling, so induced and persisted in, can cause market values of residential real estate to decline, to the general detriment of property owners, by reason of the existence of an abnormal surplus of real estate available for sale or lease.

TRANSPORTATION
Buses, Terminals—Federal Regulations

The Federal Interstate Commerce Commission on September 22, 1961, issued a regulation prohibiting discrimination on the basis of race, creed, color, or national origin in the seating of passengers aboard interstate busses. Also prohibited is discrimination in the use of terminal facilities. Signs announcing this policy are required to be posted, and the notices printed on tickets.

1. Discrimination prohibited

No motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act shall operate a motor vehicle in interstate or foreign commerce on which the seating of passengers is based upon race, color, creed, or national origin.

2. Sign to be posted in vehicles

Every motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act shall conspicuously display and maintain, in all vehicles operated by it in interstate or foreign commerce, a plainly legible sign or placard containing the statement: "Seating aboard this vehicle is without regard to race, color, creed, or national origin, by order of the Interstate Commerce Commission." This section shall cease to be effective on Jan. 1, 1963, unless such time be further extended by the Interstate Commerce Commission.

3. Notice to be printed on tickets.

Every motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act shall cause to be printed on every ticket sold by it for transportation on any vehicle operated in interstate or foreign commerce

a plainly legible notice as follows: "Seating aboard vehicles operated in interstate or foreign commerce is without regard to race, color, creed, or national origin." This section shall be applicable to all tickets sold on or after Jan 1, 1963.

4. Discrimination in terminal facilities.

No motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act shall in the operation of vehicles in interstate or foreign commerce provide, maintain arrangements for, utilize, make available, adhere to any understanding for the availability of, or follow any practice which includes the availability of, any terminal facilities which are so operated, arranged, or maintained as to involve any separation of any portion thereof, or in the use thereof on the basis of race, color, creed, or national origin.

5. Notice to be posted at terminal facilities.

No motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act shall in the operation of vehicles in interstate or foreign commerce, utilize any terminal facility in which there is not conspicuously displayed and maintained so as to be readily visible to the public a plainly legible sign or placard containing the full text of these regulations. Such sign or placard shall be captioned: "Public notice: Regulations applicable to vehicles and terminal facilities of interstate motor common carriers of passengers, by order of the Interstate Commerce Commission."

6. Carriers not relieved of existing obligations.

Nothing in this regulation shall be construed to relieve any interstate motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act of any of its obligations under the Interstate Commerce Act or its certificate(s) of public convenience and necessity.

7. Reports of interference with regulations.

Every motor common carrier of passengers subject to Section 216 of the Interstate Commerce Act operating vehicles in interstate or foreign commerce shall report to the secretary of the Interstate Commerce Commission within fifteen (15) days of its occurrence, any interference by any person, municipality, county, parish, state, or body politic with its observance of the requirements of these regulations. Such report shall include a statement of the action that such carrier my have taken to eliminate any such interference.

REFERENCE

Education: Survey of Developments 1957-61

I Introduction

This article will survey legal developments in the field of education for the four year period since May, 1957, primarily in terms of materials which have appeared in the *Race Relations Law Reporter.* It will supplement the survey in volume two of *Race Relations Law Reporter* at page 881, which covered the period May, 1954 through May, 1957.

Because of the frequent references to materials reported in the *Race Relations Law Reporter,* citations will be parenthetical to volume and page number with the year omitted; for example, a citation to the 1957 survey article would be (II: 881).

II Public Schools

A. The Principle of the School Segregation Cases

In the 1954 opinion of the United States Supreme Court in the *School Segregation Cases,* Mr. Chief Justice Warren, speaking for the unanimous Court, declared laws requiring racially separate educational facilities to be violative of the Equal Protection Clause of the Fourteenth Amendment (I: 5) and the Due Process

Clause of the Fifth Amendment (I: 9). In the implementation decision one year later, defendants in the school cases were ordered to "make a prompt and reasonable start toward full compliance" with the 1954 decision. "*Additional time*" was to be allowed the defendant school officials upon an adequate showing that such time was "*necessary in the public interest*" and "*consistent with good faith compliance.*" (Italics added.) In determining whether this burden of proof was met, the courts were to consider, among other things, the problems of "school transportation," "personnel," "revision of school districts" and the like. The cases were remanded to the various lower courts for "such proceedings . . . as are necessary and proper" to implement the announced principle "with *all deliberate speed.*" (Italics added.) (I: 11-12).

The italicized phrases above have provided a focal point for much of the litigation during the survey period. After the 1955 decree, the United States Supreme Court did not speak directly on the scope of the basic principle until 1958 in *Cooper v. Aaron*, a case arising from Little Rock, Arkansas. A summary of the facts and of the developments in lower court litigation in this case is set forth as a prelude to the significant Supreme Court decision.

In August, 1956, a class action on behalf of Negro students in Little Rock was instituted in the federal district court to compel local school officials to assign students to the public schools without discrimination on the basis of race. The defendant school board conceded the invalidity of state statutes requiring segregation and submitted a plan for gradual desegregation beginning with high school grades. The plan, approved by the court, was to become effective with the fall term of 1957 and provided that full integration would be accomplished within approximately six years (I: 851). On plaintiff's appeal, the court of appeals affirmed (II: 593). Subsequently, a white citizen brought suit against the school board in an Arkansas state court, and an injunction was granted against the school board restraining it from operating integrated schools (II: 930, 931). The board thereupon petitioned the federal district court, which promptly granted an injunction against enforcement of the state court's order (II: 934, *aff'd* III: 451). One day before the fall school term was to begin, the governor of Arkansas ordered units of that state's National Guard into state service to ". . . [maintain] law and order and to preserve the peace." The militia carried out its specific orders to prevent Negro students from entering the previously all-white Central High School (II: 937). The board then petitioned the federal district court for instructions and was ordered to proceed with integration (II: 938). Four days later the same court denied the board's petition for a temporary suspension of the order of desegregation (II: 939, 940). Subsequently, the governor of Arkansas and other state officials, having earlier been joined as parties defendant (II: 941-957), were enjoined from interfering with the implementation of the federal court's order to desegregate (II: 957, *aff'd* III: 439). The governor then withdrew the National Guard personnel. Three days later violence and disorder at the school prompted the President of the United States to provide for ordering the Arkansas National Guard into federal service and to dispatch a number of regular Army personnel from a Kentucky military installation to the scene (II: 963). Some months later the school officials filed a petition in the federal district court alleging that public opposition to integration had brought about such a degree of unrest among the pupils, teachers and parents that maintenance of a satisfactory educational program was extremely difficult and educational standards were being seriously impaired. The petition, as amended, requested that the court's order to proceed with the plan for gradual desegregation be suspended until January, 1961 (III: 621). The court found that the facts presented sufficient evidence to warrant an extension of time under the 1955 Supreme Court implementation decision. The school board was found to have acted in good faith, and the requested delay was found to be necessary "in the public interest":

> We have seen that the Supreme Court said in the second Brown decision that the transition of a formerly segregated school to a school free from compulsory segregation should be carried out in an "effective manner," and that such a transition is in the public interest. In our estimation a transition which impairs or disrupts educational programs and standards, and which will continue to do so, is not in the public interest, but, on the other hand, inflicts irreparable harm upon all of the students concerned, regardless of race. Where, as here, such a transition is being undertaken

> under the compulsive effects of a federal court order, a refusal to modify such order so as to ameliorate the situation would in our opinion under the circumstances here present be inequitable, if not arbitrary as well. (III: 637)

Finally, discussing the Supreme Court's "all deliberate speed" decree, the district court declared:

> While we do not seek at this time to authoritatively define the term "all deliberate speed" employed by the Supreme Court in the Brown case, it does seem to us that the term is a relative one, dependent upon varying facts and circumstances in different localities, and that what might be "deliberate speed" under one set of circumstances could constitute headlong haste under another. And it further appears to us that said term involves the idea of a progress toward the elimination of compulsory segregation that is consistent with the maintenance of sound educational standards and a salutary educational atmosphere, neither of which can be maintained at Central High School if the Board is compelled to keep its plan in operation at this time. After all, the function of any public school system, whether integrated or not, is to educate people. (III: 638)

On August 18,1958 the Court of Appeals for the Eighth Circuit reversed the district court's stay order but delayed enforcement of its decree until a final decision could be rendered by the Supreme Court (III: 643-649). On September 12, 1958, the Supreme Court entered a brief order affirming the court of appeals (III: 619), and an opinion was subsequently delivered on September 29 (III: 855). In this opinion, the Court reaffirmed the principles of its earlier decisions and attempted to provide further clarification:

> Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the Court should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system. (III: 856-857)

In reviewing the facts of the Little Rock case, the court made it clear that violence and disorder were not factors that might be used by the school board in meeting the burden of proving that a delay was "necessary in the public interest":

> The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. * * * Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action, (III: 860)

Thus, the Supreme Court established that the term "all deliberate speed" was, as had been thought, designed to allow desegregation programs to be tailored to the needs of the individual communities involved. However, the court explicitly warned that any attempts by state or local authorities to delay the operations of such programs would be strictly examined for determination of the issue as to whether such delay is "necessary in the public interest."

Finally, the court emphatically rejected the argument that public opposition to desegregation is one facet of the "public interest" that can be weighed in determining the necessity for rendering "all deliberate speed" more deliberate than speedy.

B. The Binding Effect of the School Decisions

An equally significant feature of the Little Rock decision involved a contention by the Arkansas governor and legislature that they were not bound by the decision in the *School Segregation Cases*. In answer to that premise, the Supreme Court cited former Chief Justices Marshall, Taney, and Hughes in opinions emphasizing the position of the Federal Constitution as the "supreme Law of the Land" and the position of the federal judiciary as interpreter of what that law is. The court then concluded:

> • • • It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the State "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." • • • Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states, may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery • • •."
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> • • •
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> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. • • • State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. (III: 861)

The position taken by the Arkansas officials was, in effect, one of the interposition—*i.e.*, that the sovereignty of the State could be "interposed" to avoid the effect of federal judiciary decisions relating to matters under state control. [See "Interposition vs. Judicial Power" (I:465)]. The issue raised by such a stand on the part of state officials was before the Supreme Court again in 1960 in a case arising out of the Louisiana legislature's attempt to bar the desegregation of schools in Orleans Parish. Following a federal court's order and self-designed plan for desegregation of said schools (V: 378), the Louisiana legislature enacted a number of bills designed to maintain segregation (V: 857-869). Four of these measures and three earlier acts were promptly declared unconstitutional by the three-judge federal court, and the governor of Louisiana and other state officials were enjoined from acting under authority of such laws (V: 666). (See V:1008, fn. 1 and V:1023, fn. 1 for a chronological account of the legislation and litigation that began in 1954). Soon thereafter, meeting in special session, the Louisiana legislature passed another series of measures (V: 1177-1235), one of which began:

> AN ACT to interpose the sovereignty of the State of Louisiana against the unlawful encroachments by the judicial and executive branches of the Federal Government in the operation of public schools of the State of Louisiana, which constitute a deliberate, palpable and dangerous exercise of governmental powers not granted to the United States by the United States Constitution • • • (V: 1177)

On November 30, 1960, a three-judge federal court considered the legislative enactments, declared twenty-three of them—including the interposition resolution—unconstitutional, and enjoined enforcement of those twenty-three (V: 1008). The United States Supreme Court, citing its own decision in the Little Rock case, accepted the district court's conclusion "that interposition is not a constitutional doctrine":

> The main basis for challenging this ruling is that the State of Louisiana "has interposed itself in the field of public education over which it has exclusive control." This objection is without substance, as we held, upon full consideration, in Cooper vs. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5. (V:1017)

Thus, during the survey period, through two significant decisions, the Supreme Court has restated, reaffirmed and clarified to some degree

the principle set down in the *School Segregation Cases*, and, further, has declared that principle as an application of "the supreme law of the land," to be wholly binding upon the states.

C. Implementation of the Principle

1. Voluntary Affirmative Action.

On the state level, substantial affirmative action toward implementing the principle has come almost entirely from the northern states or the so-called "border states." Missouri expressly repealed its statute requiring racially segregated schools (II: 1151). In Illinois statutes already prohibiting segregation have been amended to require schools, as a prerequisite to obtaining state aid, to furnish a certificate that students are not segregated (II: 1150). In contrast, in 1957 Texas adopted a statute requiring local voter approval as a prerequisite for continuing state aid to desegregated districts, (II: 695); but in 1960 the Attorney General of Texas declared that districts desegregated by court order would not lose their rights to state aid despite an absence of voter approval. [See May, 1961 *Statistical Summary* 38 (Published by Southern Education Reporting Service)]. It is of some interest to note that the 1959 Maryland legislature ratified the Fourteenth Amendment to the Federal Constitution. (May, 1961 *Statistical Summary* at 23.)

For complete statistics regarding voluntary measures at the local level, the reader is referred to *Statistical Summary*, supra. Four such voluntary plans have been reported by the *Race Relation Law Reporter*. The Pine Bluff, Arkansas, School Board in 1956 adopted a plan for integrating its formerly segregated school system. However, following racial violence in other parts of the state, the board on March 20, 1958 postponed the date on which the plan was to become operative (III: 787). A local school board in Oklahoma has declared a policy permitting, but not compelling, integration (II: 1175), and local boards in Kingsport and Johnson City, Tennessee have voluntarily adopted plans for gradual desegregation on a grade-a-year basis (VI: 329, 330).

2. Court-Ordered Implementation

a. "With All Deliberate Speed"—Local Plans for Gradual Desegration

Litigation from which court-ordered desegregation plans evolve frequently proceeds in the following manner: A class action on behalf of Negro students is brought in a federal district court against the local school board, alleging that the defendant is operating the public schools on a segregated basis; that by reason thereof plaintiffs are being deprived of their rights under the Fourteenth Amendment; that the defendant should, therefore, be enjoined from continuing such practice and ordered to admit the plaintiffs to the school to which they would have been admitted were they white students under the same circumstances. The court finds that defendant is operating its schools on a segregated basis contrary to the pronouncement of the United States Supreme Court, and orders the school officials to submit for the court's approval "a plan for the orderly desegregation of public schools with all deliberate speed." In submitting such a plan, the defendant typically contends that local conditions justify the gradual nature of the plan and perhaps a delay in implementation of the plan; on the other hand, the plaintiffs will argue that the plan is neither consistent with the "all deliberate speed" mandate of the Supreme Court nor offered in good-faith. Since the decisions of the various courts turn largely upon the view of local circumstances taken by the tribunals, there may be a reversal and a remand followed by further hearings and appeals. In some instances, litigation in a particular case has extended over several years before a final decision has been reached. Even then the court will ordinarily retain jurisdiction of the case "to insure full opportunity for further showing in the event compliance at the 'earliest practicable date' ceases to be the objective." (II: 593, 595)

(1) Nashville Plan—
"Grade-a-Year"

One of the most widely adopted plans for gradual desegregation that has been generally approved by the courts is the grade-a-year plan, which had its origin in Nashville, Tennessee, desegregation proceedings. On October 29, 1956, under court order, the Nashville city school board presented a plan that provided for the elimination of compulsory segregation in the first grade in the fall of 1957. The court approved this incomplete plan as "a prompt and reasonable start" but ordered the submission of a more complete plan that would abolish segregation altogether in the city schools (II: 21). Subse-

quently, the board submitted a plan authorizing the assignment of pupils to one of three types of schools—white, Negro or integrated—in accordance with the preference of the parent or guardian. The court found this plan repugnant to the Constitution (see also II: 970), and it ordered the submission of a "substantial plan and one which contemplates elimination of racial discrimination throughout the school system with all deliberate speed." (III: 180, 187) The board then submitted a plan which provided that, beginning with grade two in September 1958, one additional grade would be desegregated each year. Zones were to be established for particular school buildings, based upon location "without reference to race," and students were to be permitted to attend the school designated for the zone in which they resided. Included in the plan, however, was a provision authorizing transfers and listing the following circumstances as "some of the valid conditions to support" a student's application to transfer to a school other than the one to which he had been assigned:

(a) When a white student would otherwise be required to attend a school previously serving colored students only.

(b) When a colored student would otherwise be required to attend a school previously serving white students only.

(c) When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race. (I: 1121)

This plan was given district court approval (III: 651), and the Court of Appeals for the Sixth Circuit affirmed (IV: 584). The appellate court ruled that the transfer provision did not bar children from schools because of race and thus concluded that the availability of a voluntary transfer to schools attended largely or entirely by members of one's own race did not necessarily render the plan invalid (IV: 584). The United States Supreme Court denied certiorari (IV: 851). Three justices felt that there should be review limited to the transfer feature.

On November 30, 1960, the school board of Davidson County, Tennessee, which surrounds the city of Nashville, submitted in similar litigation a plan almost identical to that approved for the city schools. The court accepted the plan on condition that it be accelerated to apply immediately to the first four grades, so that the level of integration in the county would be brought up to that prevailing in the city. Some of the Negro plaintiffs objected that the plan did not meet the "all deliberate speed" requirement of the Supreme Court and that as a result thereof they would never secure their rights, because they were already in advanced classes; but the court held that the gradual nature of the plan was necessary "in the interest of the school system itself and the efficient, harmonious, and workable transition to a desegregated method of operation." (V: 1040, 1047)

The school boards of two other Tennessee cities, Knoxville (V: 670; VI: 426) and Chattanooga (V: 1035), have adopted similar plans under court order. The Chattanooga plan has since been judged to be an inadequate start and "too indefinite," but the court's objections to the plan in that case appear to have been based primarily upon the fact that at first only "selected schools" were to be involved in the segregation process. Furthermore, the latest available court order did not rule out further consideration of the plan:

> The plan which is to be recorded is not sufficient on its face but is not presently rejected. The School Board will submit an alternate, a second plan, within 60 days, with the understanding that that does not waive any right to a reconsideration of the first plan as it is or as amended, or any right of either side to except to what the Court has done today. (VI: 107, 112)

Voluntary adoption of grade-a-year plans has been announced by school boards in Knox County (V:1245), Kingsport (VI: 329), and Johnson City, Tennessee (VI: 330). The plans adopted in Kingsport and Johnson City include a liberal transfer provision identical to that in the Nashville plan. In comparing school plans it is important to note the basis of school zoning and pupil assignment as well as the time schedule and point of initial impact involved.

A modification of the grade-a-year plan has received court approval for the desegregation of Atlanta, Georgia, public schools. The plan provides for the assignment transfer of individual pupils to particular schools upon approval by the superintendent of applications made by each pupil and his parents or guardian. In contrast to the Nashville plan, then, this plan provides

that students are to remain in the schools to which they have always been assigned, and desegregation is to be accomplished by the approval of these transfer or initial assignment requests. The provisions of the plan are to apply the first year to the twelfth (12th) grade only and then to one additional lower grade each year until the public schools have been completely desegregated (V: 56). On September 13, 1960, the court filed an opinion in support of its earlier order of May 9, 1960, which delayed the implementation of the plan until the fall of 1961. In essence, the opinion declares that the delay was granted in order that the people of Georgia could reach a decision which would avoid the closing of the public schools (V: 650).

The widespread acceptance by federal courts in the South of the grade-a-year speed in desegregation is exemplified in three recent Texas cases, where plans similar to the Nashville plan were ordered put into effect. In litigation against the Houston, Texas Independent School District a plan proposing initial desegregation of one elementary, one junior high, and one senior high was rejected by the court and a grade-a-year plan substituted therefor (V: 703). In a suit challenging segregation in the Dallas County public schools, the school board submitted a grade-a-year plan. In this instance, the plan was rejected by the federal district judge, who suggested that he would approve a system of three classes of schools—Negro, white and mixed—so as to "give all concerned what they prefer." (V: 1048, 1049) The school board submitted such a plan; but on appeal, the district court's approval was reversed, and the Court of Appeals ordered the grade-a-year plan to be reinstated, eliminating therefrom a liberal transfer provision identical to that in the Nashville plan. The appellate court noted, however, that it merely preferred the grade-a-year plan over the other and that the district court had yet to determine "whether that much delay is ncessary, or whether the speed is too deliberate." (V: 1048, 1051) The district court ultimately approved the grade-a-year plan (VI: 746). Finally, in a class action against Galveston, Texas, public school officials, a federal district court enjoined the defendants from requiring and enforcing racial segregation in the Galveston schools and ordered the desegregation of the schools at the rate of a grade a year, beginning with kindergarten and the first grade in September, 1961 (VI: 117).

While the grade-a-year plan for desegregation has been judged as satisfactory compliance with the mandate of the Supreme Court by most Southern federal courts, such a gradual plan was found unjustified by local conditions in a Fairfax County, Virginia, case (V: 1056). Further, the United States Court of Appeals for the Third Circuit held that a grade-a-year plan for desegregation of certain Delaware schools did not constitute desegregation "with all deliberate speed" and explained: "[I]ntegration in . . . Delaware, which already has integrated many of its schools . . . should not be viewed, gauged or judged by the more restrictive standards reasonably applicable to communities which have not advanced as far upon the road toward full integration as has Delaware." (V: 637, 643)

(2) Pupil Placement

Reliance upon existing pupil placement regulations as a defense in desegregation litigation will be treated more extensively in a later portion of the survey; but three reported cases in which pupil placement was made the basis for court-ordered desegregation plans deserve note at this point.

In litigation against the Jefferson County, Arkansas, school board, the board officials submitted a plan providing: that for orderly transition students would generally be assigned to the school they had been attending; that during the transition period race would be considered "as an existing fact"; that lateral transfers would be generally discouraged but for exceptional cases (e.g., certain courses available only in a particular school); and that the "exceptional case" consideration would not apply to first year students. Rather than specifying a date by which full integration would be accomplished, the board merely stated that time would probably eliminate the racial consideration (V: 349). After approval in a federal district court, the plan was denounced by the Court of Appeals as "a speculative possibility wrapped in dissuasive qualifications," and the case was remanded (V: 631). The defendant school board then modified the plan by relaxing the rigidity of the transfer provisions and by agreeing to assign first grade students to the school preferred by the child's parents, if the student makes an average grade on certain qualification tests and if there is adequate room and teaching personnel at the school requested. (V: 989) The plan was declared "sufficient on its face" by the fed-

eral district court, but the case was retained in order to assure a good faith administration of the plan. (VI: 679)

Under court order, the local school board in Charlottesville, Virginia, submitted a plan providing for the placement of pupils on a strictly geographical basis. Racial discrimination in admission practices was prohibited under the plan, and the assignment of a pupil to a school outside his district was to be permitted if the student and his parents should prefer and if the transfer was found to be consistent with the academic best interests of the student and not violative of the numerical enrollment limitation. The plan was given federal district court approval (IV: 881). Subsequently, ten Negro students in Charlottesville appealed to the Court of Appeals for the Fourth Circuit for a reversal of the district court's decision sustaining the school board's denial of their applications for enrollment in previously all-white schools. The appellate court ruled that the residence and academic achievement are constitutionally acceptable tests in determining what schools children should attend, so long as race and color are not considered in applying those tests. After examining the manner in which the Charlottesville plan was being administered, however, the court expressed concern over the fact that the plan was in some instances being applied contrary to its express provisions and in violation of the Fourteenth Amendment. Nevertheless, since many of the assignments of Negro children to white schools had been made on the initiative of the school authorities, the court found that a significant start toward desegregation had been made; and noting that the district court had retained the case on the docket for re-examination before the beginning of the next school year, the court of appeals affirmed the decision and expressed confidence in the school board's insistance that the present policy on pupil assignment was only temporary and that the board intended to comply with the law (VI: 439).

In another Virginia case, the school board for Warren County received district court approval of a plan which provides for two high school zones—one for the previously all-white school and the other for the previously all-Negro school. Under the plan, transfers are to be allowed upon request by any student who would otherwise be required, because of residence, to attend a school in which members of a different race predominate. (VI: 121)

b. General Desegregation under Court Order

As seen in Virginia and Delaware decisions, *supra*, where grade-a-year plans were rejected by the courts, the gradual desegregation often proposed by local school boards may be held to be unnecessary for an effective and orderly compliance with the Supreme Court's ruling in that particular community or school district. In rejecting gradual desegregation, the courts in such cases are seeking to comply with the Supreme Court's directive that "in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools." (III: 856) During the survey period, in addition to the Virginia and Delaware cases, litigation in Kentucky (II: 1111) and in Kansas (III: 7) has resulted in an order for general desegregation to begin "in no event later than the commencement of the [next] fall term. . . ." (III: 7, 8) In other instances, immediate admission of individual plaintiffs has been ordered with further directions as to general desegregation. Thus, in a 1958 Oklahoma case, four Negro students were ordered admitted to a formerly all-white school, and the school board was ordered to prepare for general desegregation by the 1959-1960 school term. (III: 1154) And in *Crisp v. Pulaski County School Board* (V: 721), fourteen Negro students were ordered admitted to Pulaski County, Virginia, public high schools on a non-discriminatory basis, and the defendant was ordered to admit to those schools all qualified Negroes who apply on or before March 15 of any year for enrollment at the term starting the following fall. [See also IV: 874 (children of Negro servicemen, residing on a U.S. military base in Tennessee, ordered admitted to surrounding public schools on a non-discriminatory basis); VI: 89, 90 (Louisiana State Board of Education enjoined from excluding qualified Negroes from certain Louisiana trade schools).] In a North Carolina case, a Greensboro school board assigned Negro plaintiffs to a formerly all-white school, and then promptly approved the applications for transfers of all white students enrolled there. A federal district court denied relief, but the Court of Appeals held that the school board's actions

were not only contrary to the pronouncements of the United States Supreme Court but violative of the provisions of the North Carolina placement law as well. The board was instructed to "reassign the minor plaintiffs to an appropriate school in accordance with their constitutional rights." (V: 1027, 1030) On remand to the district court, the plaintiffs were allowed ten days to advise the school board as to which school they desired to attend, and jurisdiction was retained to assure plaintiffs further relief if necessary to protect their constitutional rights. (VI: 721)

Finally, there is a pair of Louisiana cases in which no plan was requested but in which time was allowed defendants in order to "make arrangements for admission of children to . . . schools on a racially non-discriminatory basis with all deliberate speed." (V: 653, 654; VI: 81, 83) Just what degree of desegregation will satisfy this order remains to be seen. In one case, action on the part of parish officials to close the public schools by referendum further complicated the situation (VI: 416), but the statute authorizing such action has since been struck down as a denial of equal protection and as part of a legislative package plan to maintain segregated schools (VI: 694). The Supreme Court denied certiorari (VI: 676).

D. State Defensive Measures

All of the southern states have taken what may be termed defensive steps, ranging from school closing laws to pupil placement legislation, in an effort apparently to prevent school integration entirely, to limit it to token proportions, and to facilitate as much delay as possible.

1. Pupil Placement

Some method of pupil placement or assignment is a necessary aspect of public school administration. Numerous local school boards throughout the nation have long employed a basic principle of pupil placement, such as geographical location of the individual pupil, in assigning students to particular schools. A striking example of the possibility of racial factors entering into the arrangement of school zone boundaries is seen in the recent *New Rochelle* case, arising in the Southern District of New York, where the alleged good faith "districting" of certain areas was questioned. There the district court found that since 1930 the city school board of New Rochelle, New York had pursued a gerrymandering policy in redrawing district lines, so that ultimately practically all Negros were located in a single district. Subsequently, all white children in the district had been allowed to transfer to other schools, and by 1949 a segregated school situation existed in the city school system. Although the school was 94% rather than 100% Negro at the time the case was heard, the district court found that a segregated situation had been created by the school board, rejected the board's school districting policy insofar as it resulted in a "bare token" of integration, and ordered presentation of a desegregation plan which would begin no later than the 1961-62 school year (VI: 90). The Court of Appeals for the Second Circuit dismissed an appeal by the board, declaring that it had no jurisdiction over the case "until the District Court has finished its work by directing the Board to take or refrain from action." (VI: 418) The board then submitted a plan under protest. The district court approved the plan after rejecting the provision that, as one condition for permissive transfer, a student must obtain a recommendation from his teacher based on the student's academic ability. The court of appeals affirmed the holding of the district court both as to the finding on deliberate racial segregation in the city's schools and as to the board's plan. The United States Supreme Court rejected a petition by the board for a stay of the mandate pending a petition for certiorari (VI: 700).

The *New Rochelle* case illustrates action taken by local authorities under laws not designed to create racial segregation. Since the decision in the *School Segregation Cases*, pupil placement statutes, incorporating a wide range of placement considerations, have been enacted in most southern states, with the apparent objective of staving off desegregation. During the survey period the Louisiana legislature passed a pupil placement statute (V: 857) similar to those already in force in Alabama, Arkansas, Florida, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia (II: 889). The Texas statute expressly states that neither "national origin" nor "ancestral language" is to be considered in pupil assignment (II: 694). The other acts do not contain any reference to racial considerations but rather set out the factors to be considered by school officials when assigning or transferring individual students to an appropriate school. Thus, the Alabama statute (I:

235, 236) refers to: "available room and teaching capacity in the various schools", "the availability of transportation facilities", "the suitability of established curricula for particular pupils," "the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof", "the psychological effect upon the pupil of attendance at a particular school", "the possibility or threat of friction or disorder among pupils or others", "the possibility of breaches of the peace or ill will or economic retaliation within the community", "the maintenance or severance of established social and psychological relationships with other pupils and with teachers", "the morals, conduct, health and personal standards of the pupil."

Statutes containing provisions similar or identical to those above appear to have a twofold purpose in connection with the desegregation of schools. First of all, a delay in the desegregation process may be sought to be accomplished by requiring the placement board to dispose of transfer requests on an individual basis. The disposition, if unfavorable to the applicant, must be reviewed by the higher education officials before the applicant can appeal to the courts. If the courts adhere to the rule that an aggrieved party must normally pursue all administrative remedies before resorting to the courts, they will require the exhaustion of remedies provided in the pupil placement statute before granting any type of judicial relief. [See *McKissick v. Durham City Board of Education*, IV: 864 and *Wheeler v. Durham City Board of Education*, VI: 733; and see II: 889-891 for a full discussion of this point.] Secondly, the statutes appear to be designed to limit desegregation to token proportions by application of standards such as those in the list above. If the courts find that the objectivity of such standards is being distorted in cases involving pupils of different races and that some students are in reality being denied admission to certain schools solely because of their race, presumably such application of the statute will be enjoined. However, the courts have refused to anticipate an unconstitutional application of the statutes in the absence of clear evidence of such a result on the face of the statute. In this respect, the most significant court decision during the survey period is that of the United States Supreme Court, affirming a federal district court in Alabama which refused to declare the Alabama Placement Act unconstitutional. In a per curiam opinion the high court "affirmed upon the limited grounds on which the district court rested its decision." (III: 867) Hence, until the Supreme Court speaks again on this issue, the following words of the federal district court in Alabama may be looked upon as representative of the federal judiciary's position:

> All that has been said in this present opinion must be limited to the constitutionality of the law *upon its face*. The School Placement Law furnishes the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State. (III: 425, 434)

Thus far only the Virginia statute has been expressly invalidated (II: 890), and one year later the stricken statute was reenacted in an amended form (III: 343). The new statute omits the factor of race as one consideration in the assignment of pupils and provides merely that students shall be so assigned "as to provide for the orderly administration of public schools, the competent instruction of the pupils enrolled and the health, safety and general welfare of such pupils." (III: 343, 344). The history of the current Louisiana statute is somewhat similar. It was originally enacted in 1954 as Act 556 (See footnote 5, II: 310) and by dictum declared unconstitutional in *Orleans Parish School Board v. Bush* (II: 308, 314). In 1958 an interim act repealed and superceded the original one (III: 1059), and the 1960 Louisiana legislature reenacted and amended, in minor particulars, the 1958 act (V: 857). Other pupil assignment statutes which have been attacked directly or indirectly, but unsuccessfully, are those in Arkansas (V: 43), Florida (III: 907), North Carolina (IV: 864), Tennessee (V: 1035) and Texas (IV: 878). In a subsequent Arkansas case, however, the manner in which that state's placement law was being applied was condemned by the Court of Appeals for the Eighth

Circuit in a decision that clearly demonstrates the position of the federal judiciary when it is satisfied by the evidence that racial discrimination is being practiced in the administration of placement regulations:

> The standards and criteria of the pupil assignment law cannot be given application to preserve imposed segregation. The obligation to disestablish imposed segregation is not met by applying placement or assignment standards, educational theories or other criteria so as to produce the result of leaving the previous racial situation existing as it was before. If application of standards and criteria has the effect of preserving a created status of constitutional violation, such application fails to constitute a sufficient remedy in dealing with the constitutional wrong. (VI: 59, 67)

The district court was ordered to retain jurisdiction of the case so as to assure the plaintiffs that the Arkansas placement law would be applied in accordance with the specifications set down by the appellate court. Subsequently, the district court reviewed the board's report and found compliance with the mandate of the appellate court in the approval by the board of 40 out of 116 requests by Negro students for assignment to predominantly white schools. (VI: 682)

2. School Closings

At the writing of the previous survey only Georgia, North Carolina and Virginia had taken the more drastic action of enacting statutes permitting the closing of the public schools. Since 1957, however, Arkansas (III: 1048), Florida (II: 1149), Louisiana (III: 778; V: 861, 864), Mississippi (III: 553) and Texas (III: 87) have enacted statutes of this type. The typical school closing statute provides that the governor may close a school in the event of certain conditions, generally including the threat of integration or disorder. The Florida statute, however, automatically closes the school at any time military forces are employed or used under federal authority at or in the vicinity of the school.

Louisiana originally had three statutes authorizing the closing of public schools. The earliest, a 1958 statute, empowered the governor to close "any racially mixed public schools or schools under court order to racially mix its student body" (III: 778); in 1960 another act was passed to enable the governor to close *all* public schools when *any* public school or system is threatened with integration (V: 861); and still a third statute directed the governor to close any public school when necessary to end or prevent violence or disorder (V: 864). All three of these statutes were declared unconstitutional in *Bush v. Orleans Parish School Board* (V: 655). In its first extraordinary 1960 session the Louisiana legislature repealed the three statutes and then enacted three replacement statutes, which were also subsequently declared invalid together with twenty additional acts and resolutions passed during the same legislative session (V: 1008). The latest Louisiana statute, enacted during the second extraordinary 1961 session of the Louisiana legislature, provided certain procedures for the closing of public schools upon submission to a referendum (VI: 310). This act was also subsequently declared unconstitutional (VI: 694).

The Georgia legislature has, in effect, replaced its original statute with one that provides for a system of local option elections on the closing and reopening of schools within a single county, city, or local system (VI: 289).

3. Private School Legislation and Grants

Some states have enacted legislation to encourage and facilitate the establishment of private schools. Statutory provisions to this effect will presumably be utilized only in the event of integration or closing of the public schools. Thus, Louisiana has provided for the establishment of "educational co-operatives" (III: 768) and has enacted a statute permitting such co-operatives to enter into contracts with certified teachers (VI: 304). In connection with this entire procedure, another act was passed to allow Louisiana school boards to dispose of public school property (VI: 305). Florida has created a Board of Private Education with power to issue certificates of approval to private schools (IV: 755, 762) and the State Corporation Commission of Virginia has issued a certificate of incorporation to the Tidewater Educational Foundation, whose purpose is to provide educational opportunities in private educational establishments in Norfolk (III: 789).

. Additional facilitation of the establishment of private schools is provided through state statutory provisions allowing tuition grants to be awarded to students who desire to attend private non-sectarian schools or public schools in an-

other district. These provisions generally appear to presuppose the continuation of public schools on an integrated basis, and thus have been enacted in order that all students who wish to do so may continue their education on a segregated basis. Alabama (IV: 1056), Arkansas (IV: 766), Georgia (VI: 290), Louisiana (III: 1062) and Virginia (V: 521; see also III: 1241, IV: 191, 192, 415) have enacted such statutes. A 1956 Virginia constitutional amendment allowing the appropriation of public funds for the education of children in private schools was held incapable of construction which would authorize the diversion of funds from public schools for the payment of tuition grants to private schools, since Virginia is constitutionally bound to maintain efficient public schools (IV: 65). In the related case of *Allen v. County School Board of Prince Edward County* (VI: 749), ordinances providing for grants-in-aid to be awarded Prince Edward County students who attended approved private schools were declared invalid as attempts to circumvent a prior injunction forbidding racial segregation in the county's public schools, which had subsequently been closed. The court stated:

"We do not hold these County ordinances are facially unlawful. We only hold they become unlawful when used to accomplish an unlawful end, (the perpetuation of segregated schooling in Prince Edward County).

"Therefore an order will be entered herein restraining and enjoining the members of the Board of Supervisors of Prince Edward County, the County Treasurer and their respective agents and employees from approving and paying out any county funds purportedly authorized by the so-called "grant in aid" ordinance, adopted July 18, 1960, and from allowing any tax credits purportedly authorized by the so-called "tax credit" ordinance, adopted July 18, 1960, during such time the public schools of Prince Edward county remain closed."

4. Repeal of Compulsory School Attendance

Since 1957 Florida (IV: 753), Tennessee (IV: 391), and Virginia (IV: 188) have joined that group of states which have repealed or amended compulsory school attendance statutes. The group includes Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina (II: 892). In this vein it is of interest that the 1961 Georgia legislature has proposed an amendment to that state's constitution to declare "that freedom from compulsory association at all levels of public education shall be preserved inviolate." (VI: 315)

5. Miscellaneous Measures

It is apparent that action such as the closing of public schools has a chaotic effect upon the financial organization of the school system. To meet this problem the Arkansas legislature devised a plan of establishing, by local option, "equalizing school districts" whereby the tax money available to the county school board would be expended in the "equalizing" districts in proportion to the number of students enrolled in the public schools of that district. In effect, it amounted to one district's utilizing funds allocated for another district within the same county in the event school enrollment increased in the former district as a result of school closing in the other. This enactment was attacked by taxpayers and was declared by the Arkansas Supreme Court to violate the Arkansas Constitution (IV: 855).

Miscellaneous developments in the struggle to solve the problems of public school finance due to these state defensive measures include: the enactment of a statute providing for a credit against the state income tax for contributions to private educational organizations (Georgia, IV: 182; Virginia, V: 523; see *Allen v. County Sch. Bd. of Prince Edward Co.*, VI:); the enactment of a statute directing the withholding of state funds during the period in which a school is closed (Arkansas, III: 1043); the enactment of a statute prohibiting the furnishing of free textbooks or other school supplies to an integrated school (Louisiana, V: 857); and the enactment of a statute limiting distribution of state funds to segregated schools (Virginia, III: 767).

E. Affirmative Actions of Resistance

State actions discussed in the preceding section were labelled as measures employed by the various states to defeat or avert the effort of those seeking school desegregation. There are related phases which might be termed affirmative actions or counter-measures, as they place the resisting states on the offensive. Paramount among these offensive measures have been attempts to end or limit activities of the National Association for the Advancement of Colored People within the state, and the formation of

state sovereignty commissions or other organizations dedicated to the fostering of segregated education.

1. States v. NAACP

a. *Registration and Filing Requirements*

During the survey period statutes requiring registration and the filing of certain information by organizations meeting the statutory description have been enacted in Arkansas (III: 1054; IV: 775), Texas (III: 90), and Virginia (II: 1021). Local ordinances to the same effect are in force in Little Rock and other Arkansas cities (II: 1158), and one identical to that in Little Rock was proposed by the Attorney General of Georgia in a letter to the mayors of various cities in that state (III: 128). Under the Arkansas and Texas statutes, an organization must comply if it is "engaged in activities designed to hinder, harass and interfere with the powers and duties of the State . . . to control and operate its public schools," while in Virginia the organization need only oppose or promote racial legislation—advocate racial integration or segregation—to be bound by the statute. The local ordinances referred to impose registration and filing requirements on any organization upon request by city officials.

Litigation involving the Arkansas and Virginia statutes was brought during the survey period, as was a suit invoking the Little Rock ordinance. The latter action terminated with a reversal by the United States Supreme Court, which held that the city ordinance was an encroachment upon the First and Fourteenth Amendments insofar as it was invoked to force payment of occupational taxes or disclosure of the names of local NAACP members. (V: 35) The decision mirrors the high court's previous opinion in an Alabama case. There, the NAACP had been temporarily restrained from doing business in Alabama and had been ordered to produce certain records, including a membership list. On its refusal to disclose the names of its members, the association was held in contempt of court. The United States Supreme Court dissolved the judgment of contempt, declaring that the association was protected under the Fourteenth Amendment from a forced state scrutiny of membership lists. (See IV: 347, and further developments at IV: 535, V: 809 and VI: 497.)

Under the Arkansas statute, the NAACP was ordered to produce names of state and local officers, publications, records listing state contributors, and the like. The Arkansas Supreme Court upheld the order, noting that the trial court had subsequently modified the request for membership lists to require only a statement of total donations from Arkansas citizens. (IV: 142; and see V: 179 for related litigation.)

In the Virginia litigation, the NAACP sought an injunction against enforcement of certain Virginia legislation, including the statute requiring registration and reports by organizations involved in racial litigation. An injunction having been granted, defendants appealed to the United States Supreme Court, which ruled that the district court should have refrained from deciding the merits until the state courts had been given a reasonable opportunity to construe the statutes involved (IV: 527). A judgment declaratory of the construction of said statutes had not as yet been rendered at the time of this writing. (VI: 249)

b. *Inspection of Records*

In addition to requiring the filing of information, some states have expressly authorized certain public officials to inspect the original records of organizations fitting the statutory description.

An Arkansas statute empowers the Attorney General to visit the offices and inspect the records of organizations which "have interfered with the peace and proper administration of the public schools and institutions of the State of Arkansas." (III: 1056)

The Virginia State Corporation Commission has ruled, upon application by the NAACP, that, under a Virginia statute requiring persons and corporations which solicit funds to make books available for inspection by state officials, copies of the required information cannot be substituted for the original books (V: 285).

In a Superior Court for Fulton County, Georgia, the NAACP was fined $25,000 for failing to comply with a court order directing that the organization's records be made available to the income tax division of the state revenue department. (III: 312; and see IV: 351 and V: 462 for further developments in the case, relating to the refusal by the Superior Court Judge to sign the NAACP's bill of exceptions necessary for an appeal and concerning the unsuccessful attempts by the NAACP to have the fine reduced.)

c. *Legislative Investigations*

During the survey period statutes providing for the legislative investigation of certain types of organizations have been enacted in Virginia (II: 1023), Mississippi (III: 556) and Florida (III: 784).

The Virginia act provides for the appointment of a joint committee of the General Assembly to hold hearings and investigate organizations "which seek to influence, encourage or promote litigation relating to racial activities." In Mississippi, the Secretary of State has been authorized to direct the general legislative investigation committee to make an investigation of any organization that has an officer belonging, now or formerly, to an organization or group designated by the United States Attorney General or congressional committee as subversive or as a Communist front organization.

The Florida statute merely provides for the appointment of a joint legislative committee to investigate activities of organizations that advocate violence. This statute was challenged but was upheld as constitutional by the Supreme Court of Florida in *Gibson v. Florida Legislative Investigation Committee* (IV: 143). It is to be noted that, in its opinion, the Supreme Court of Florida authorized the committee to require answers to questions relating to NAACP membership and to require the production of NAACP records for certain purposes, unless it was shown that the disclosure of NAACP membership in Florida would deter membership participation for fear of retaliation.

2. STATE SOVEREIGNTY COMMISSIONS

Much of the investigating and probing referred to during the foregoing discussion has been done by or under a state sovereignty commission or other group of similar purpose. Organized primarily to assert that the individual states have unfettered authority in the field of public education, these commissions are given subpoena powers and the right to hold hearings over matters within their field of interest. Typical of the statutes establishing such groups is the act passed during the survey period by the 1960 session of the Louisiana legislature. Under the statute, the commission consists of the governor, lieutenant governor, attorney general, president pro-tem of the senate, speaker of the senate, and eight citizens appointed by the governor. The duty of the commission is stated to be "to protect the sovereignty of the State of Louisiana from encroachment thereon by the Federal Government. . . ."

3. MISCELLANEOUS

The 1959 Arkansas legislature enacted a statute making it unlawful for the state or any school district, county or city in the state to employ members of the NAACP (IV: 460). The act was challenged by a Negro public school teacher in the case of *Shelton v. McKinley* and was declared by a United States District Court to be unconstitutional under the Fourteenth Amendment (IV: 694).

In Louisiana, under a 1958 statute, Louisiana non-trading corporations were prohibited from affiliating with any out-of-state organization having officers who are members of "Communist, Communist-front or subversive organizations as cited by the House of Congress un-American Activities Committee, or the United States Attorney general." (V: 530) This statute was declared unconstitutional by the United States District Court as requiring "the impossible," in that the Louisiana non-trading organization could not possibly determine whether the officers of the out-of-state organization were members of the stated groups. (V: 467) The United States Supreme Court affirmed on appeal (VI: 385)

III Colleges and Universities

A. Application of the Principle in the School Segregation Cases

The application of the principle in the *School Segregation Cases* to graduate and professional students in state universities was made clear in a case involving admission to the College of Law of the University of Florida. In an action commenced in 1949, a Negro sought admission to the School of Law at the University of Florida (II: 894). After prolonged litigation, the United States Supreme Court denied certiorari "without prejudice to the petitioner seeking relief in an appropriate United States District Court." (II: 1093) A class action was then brought in a federal district court requesting an order requir-

ing his admission to the University of Florida Law School and enjoining the defendants from refusing to admit qualified Negro applicants solely on the basis of race. The court denied the request for a temporary injunction ordering plaintiff's immediate admission, but this denial was reversed by the Court of Appeals for the Fifth Circuit (III: 462). On remand, the district court found that the plaintiff had failed to prove his eligibility but held that the class action was properly brought. The court, therefore, issued a limited injunction restraining defendants "from enforcing any policy, custom or usage of limiting admission to the *graduate* schools and *graduate* professional schools of the University of Florida to white persons only." (III: 657)

Cases involving the admission of Negro applicants to the regular undergraduate departments of state colleges and universities have arisen during the survey period in Georgia, Louisiana, Tennessee and Texas. The recent litigation in Georgia was, perhaps, the most significant in that a court order for integration in the face of violence and disorder reflected and continued the Supreme Court's policy that "constitutional rights . . . are not to be sacrificed or yielded to . . . violence or disorder. . . ." The events in Georgia began when two Negroes brought a class action in federal district court against the registrar and the assistant director of admissions of the University of Georgia alleging that their applications for admission had not been processed nor favorably acted upon solely because of their race. They prayed that defendants be enjoined from refusing to consider their applications and those of other Negro state residents upon the same terms applicable to white applicants, from discriminating solely on the basis of race and color, and from continuing to limit admissions at certain schools in the state university system to white students and those at certain others to Negro pupils. The court refused defendants' motion to dismiss, holding that it was proper for the cause to remain pending "for a reasonable time" to allow plaintiffs to exhaust their administrative remedies (V: 1069). The university officials interviewed plaintiffs and found that one was not a "suitable applicant" and the other could not be admitted "due to limited facilities." After a final hearing on the plaintiffs' complaint, the court found: that if the plaintiffs had been white applicants they would have been admitted to the university not later than the beginning of the fall term of 1960; that plaintiffs had been denied admission solely because of their race; and that there is a tacit policy excluding Negroes from the university because of race. The court accordingly enjoined defendants from refusing to consider and approve the applications of plaintiffs and other Negro state residents on the same terms applicable to white residents; from refusing to act expeditiously upon applications from Negro state residents; from refusing to approve the applications of qualified Negro state residents solely because of race and color; from subjecting Negro applicants to requirements, interviews, delays and tests not required of white applicants; from making attendance of Negroes subject to conditions not applicable to white students; from refusing to advise Negro applicants promptly and fully concerning their applications, admission requirements, and status; and from continuing to pursue the policy of limiting admission to white students. Further, because it found the plaintiffs to be qualified, the court enjoined defendant from refusing to permit plaintiffs to enroll and enter the university for the winter quarter, 1961, or at the appropriate time for a subsequent quarter as either plaintiff might elect, provided proper application be made (V: 1077).

Subsequently, the Court of Appeals for the Fifth Circuit made the injunction permanent, reasoning that a constitutional right cannot be withheld simply because granting the relief will produce difficult or unpopular results. The court also refused to consider the argument that relief should be denied when the state has taken action to make compliance with the court order difficult or even impossible. The United States Supreme Court denied defendants' motion to vacate the order of the Court of Appeals (V: 1089). The governor of Georgia then announced publicly that the 1956 Appropriations Act required him to cut off the funds to the university, and he ordered the university closed for a week. The district court immediately ordered that the governor and other state officials be temporarily restrained from cutting off funds to the university, and set the hearing for the plaintiffs' motion for a temporary injunction. Plaintiffs were admitted to the university, and the district court granted the plaintiffs' motion for a temporary injunction to restrain state officials from cutting off funds to the university. The statute authorizing such action was declared to be unconstitutional in view of Supreme Court de-

cisions holding similar provisions unconstitutional (V: 1093). Because of subsequent violent demonstrations, plaintiffs were suspended and removed from the university "in order to protect all students." The district court then made the university's president and dean of students parties to the action, directed the suspension order terminated in three days, and temporarily enjoined university officials and employees from suspending or otherwise causing plaintiffs to leave the university for any reason related to mob action or violence (V: 1096). Two months later, one of the plaintiffs petitioned the court for a clarification of its order and specifically sought the right to be admitted to the university dining hall. The court ruled that its injunction meant ". . . that the defendants, with respect to the opportunities and facilities which it extends and offers to white students cannot deny such facilities and opportunities to those plaintiffs solely on the basis of their race and color." (VI: 125)

The Louisiana litigation resulted in an injunction against the Board of Supervisors and officers of Louisiana State University, requiring them to discontinue denying certain applicants and others of their class admission to the University. The Court of Appeals for the Fifth Circuit affirmed the decision of the federal district court (IV: 612). The Tennessee case involved Memphis State University and a resolution of the state board denying the immediate admission of plaintiffs to that school. During the course of the trial, the university's president, the state board, and the state attorney general indicated that the plaintiffs would not be discriminated against and would be admitted at the next term. Therefore, the court declared that the case "might" be moot and postponed to a future date the further consideration of the pending motions for injunctive relief, assuring the parties the right to petition the court for action if it should become necessary to protect their rights (IV: 888). Finally, a Negro was ordered admitted to West Texas State College under the same requirements as white students, and the school was directed to discontinue the policy of denying students admission solely because of their race. (V: 740)

B. Sex as Basis for Admission

Two suits, both filed in Texas, arose during the survey period with respect to sex as the basis for admission of students. The cases involved discussions of the application of the principle of the *School Segregation Cases*. Both suits were brought by women seeking admission to Texas A. & M. In the first suit, the request was denied because plaintiffs had been treated no differently than other female students and because sex was a reasonable basis for classification. The United States Supreme Court denied both certiorari and rehearing (IV: 302). In 1960, the Texas Court of Civil Appeals again refused to grant an injunction prohibiting the enforcement of the regulation barring women from Texas A. & M. (VI: 730).

C. Legislation

The Alabama, Louisiana and Tennessee legislatures have passed several resolutions concerning admission practices to their respective state colleges and universities. The 1959 Alabama legislature allowed the state board of education to provide assistance at the college and university level to Alabama citizens when such instruction is not available at Alabama state-supported institutions (IV: 1056). The 1956 session of the Louisiana legislature provided for a certificate of good moral character, to be furnished by local and parish school officials, as a prerequisite to admission of students to state-supported colleges. This legislature also passed a law which made "advocating or in any manner performing any act toward bringing about integration of the races within the public school system cause for removal of permanent teachers." The Court of Appeals for the Fifth Circuit held that the two Louisiana acts were properly found to be unconstitutional by the district court (III: 209). The Tennessee State Board of Education issued a resolution in 1957 authorizing the admission of all qualified applicants who meet the entrance requirement of the respective colleges and universities effective in the fall of 1958. The resolution provides for limitation of enrollment through the institution of "selective devices," provided that such devices apply equally to all prospective students (II: 1176).

IV Student Transportation

During the survey period only one case arose concerning transportation of children attending public schools. The plaintiff, a Negro student attending a desegregated school in Maryland, brought a class action challenging a decision by the school authorities denying him the privilege of riding to and from school on the "white" bus. While the case was pending the school officials announced a policy of deciding transportation questions on an individual basis and notified the plaintiff that his request had been granted. The defendant's motion for dismissal of the suit was then granted on the ground that the action had become moot (III: 973).

V Teachers

Three states enacted legislation pertaining to school teachers during the survey period. As an obvious outgrowth of the Little Rock situation, the 1959 Arkansas legislature enacted a statute authorizing teachers in certain nonprofit schools to continue their membership in the state-wide teacher retirement system (IV: 766), and another providing for the continuation of official duties by school district directors incarcerated because of failure or refusal to comply with court-ordered integration (IV: 765). Similarly, the Louisiana legislature, as an outgrowth of the New Orleans controversy enacted a statute continuing the salary of any school official who is called away from his normal duties as a consequence of federal action relating to integration (III: 779). California's enactment is of a different tenor. It provides for the appointment of a commission "to assist and advise local school districts in problems relating to racial, religious or other discrimination in connection with the employment of certified employees." (II: 1151)

In one of the many cases arising in Little Rock, the United States Supreme Court declared unconstitutional a statute requiring, as a prerequisite to the employment of teachers, that the applicant submit an affidavit listing the organizations to which he had belonged, paid dues, or made regular contributions during the five years preceding the application. The court declared the statute void as going "far beyond what might be justified in the exercise of the State's legitimate inquiry." (V: 965)

Teachers in Delaware (V: 104), Maryland (III: 975), Michigan (V: 1247), Missouri (IV: 613), New Jersey (III: 1162), and West Virginia (IV: 897) brought suits during the survey period in which they alleged discrimination against them on the basis of race. In only the Michigan case was racial discrimination found. This proceeding was before the Michigan Fair Employment Practices Commission, which ordered the defendant to (1) cease and desist from its unfair employment practices, (2) offer plaintiffs teaching employment the following school year, (3) pay plaintiffs back pay at the normal rate beginning with the school year for which plaintiffs had sought employment and continuing until teaching employment was offered, subtracting earnings from other employment, (4) provide fringe benefits to plaintiffs for the same period and (5) submit a compliance report within thirty days.

In a Florida desegregation suit, the defendant school board was granted a motion to strike all references to non-student personnel from the complaint. The court held that the *School Segregation Cases* and subsequent interpretations thereof concerned only the issue of the segregation of students and thus did not provide any precedent for holding that the assignment of teachers on the basis of race is a violation of equal protection. (VI: 73). A similar motion made by the defendant school board in the Davidson County, Tennessee, case (V: 1040) was reserved by the federal district court; at a later hearing an order for the general desegregation of teachers was refused for the present, but it was recognized that the motion posed "a serious question under the Equal Protection Clause of the Fourteenth Amendment." (VI: 114, 115).

VI Private Schools

Since the last survey article (II: 881) the developments with regard to discrimination in private schools have dealt largely with the issue of what constitutes state action in this field. In the *Girard College* case the Supreme Court of Pennsylvania (III: 188), on remand from the Supreme Court of the United States, affirmed the Orphan's Court decision (II: 992) to replace the Board of Directors of City Trusts as trustees and substitute 13 private persons. The Supreme Court had held that the Board of City Trusts, acting as trustees under a trust established for "poor white male orphans" was engaged in state action violative of the Fourteenth Amendment (II: 591). The Supreme Judicial Court of Maine, in *Squires v. Augusta*, recognized the state legislature's power to exercise complete control over education, and presumably to make available public funds for transportation to and from private schools. However, while not reaching the constitutional issue, the court declared a city ordinance that authorized the city of Augusta to finance such transportation void on grounds that the state legislature had not delegated its power to the city (IV: 885). A Connecticut statute making such a delegation of power, but providing that funds specifically set aside for public schools could not be used for private school transportation, was held constitutional by the Connecticut Supreme Court of Errors. In this case the Supreme Court of the United States dismissed an appeal "for want of a substantial federal question." (VI: 55)

The only case bearing on the issue of whether the *School Segregation Cases* applied to private schools was *State v. Highlander Folk School* (V: 91). The Grundy County, Tennessee, Circuit Court held that the Supreme Court's decision in the *School Segregation Cases* did not have the effect of rendering Tennessee's school segregation statute unconstitutional as applied to private schools. On appeal to the Supreme Court of Tennessee the trial court's decision was upheld without reaching this constitutional issue.

Finally, the Attorney General of Massachusetts was asked for an opinion concerning the right of private schools to require a photograph of prospective students before they are accepted for admission. Basing his reply on the Massachusetts Fair Education Practices Act, the Attorney General ruled that the requirement of a photograph before admitting a student is unlawful. (III: 797)

BIBLIOGRAPHY

Books and Pamphlets

Ashmore, Harry S. *The Other Side of Jordan*, New York, W. W. Norton & Co. 1960. Pp. 155, $3.50.

A study of the Northern urban Negro and segregation in the North.

Banton, Michael. *White and Coloured*, New Brunswick, Rutgers University Press, 1960. Pp. 218, $4.00.

A review of the reactions of Britons toward colored immigrants, indicating that their behavior toward colored people is ambiguous but developing along the lines of Americans' reaction to the Negro.

Bardolph, Richard. *The Negro Vanguard*, New York, Rinehart & Co. 1959. Pp. 388, $6.95.

Accounts of the lives of several hundred Negro Americans, from the days of the American Revolution to the present.

Bestor, Arthur. *State Sovereignty and Slavery*, Journal of the Illinois State Historical Society, Summer, 1961, issue. Pp. 64.

A re-interpretation of proslavery constitutional doctrine, 1846-1860.

Broderick, Francis L. *W.E.B. DuBois: Negro Leader In a Time of Crisis*, Stanford University Press, 1959. Pp. 259, $5.00.

The biography of W.E.B. DuBois, stressing his importance to the Negro's development in American society.

Dean, John P. and Rosen, Alex. *A Manual of Intergroup Relations*, Chicago, University of Chicago Press, 1959. Pp. 193, $4.50.

A basic handbook for workers in intergroup relations and for those actively engaged in reducing segregation and discrimination.

East, P. D. *The Magnolia Jungle*, New York, Simon and Schuster, 1960. Pp. 243, $3.95.

An autobiography of the life, times and education of the Southern editor of *The Petal Paper*.

Freedom in the Balance. (Opinions by Judge Henry W. Edgerton), edited by Eleanor Bontecou, Ithaca, New York, Cornell University Press, 1960. Pp. 278, $5.75.

A collection of Judge Edgerton's opinions in the field of civil liberties.

Giles, Harry H. *The Integrated Classroom*, New York, Basic Books, Inc., 1959. Pp. 338, $5.00.

An analytical look at the varying racial, religious, national and socio-economic conflicts in the integrated classroom.

Hagan, William T. *American Indians*, Chicago, University of Chicago Press, and Toronto, University of Toronto Press, 1961. Pp. 190, $4.50.

A review of the Caucasian-Indian relationship from colonial American time down to the present.

Handlin, Oscar. *The Newcomers*, Cambridge, Harvard University Press, 1959. Pp. 171, $4.00.

A study of the influx of Negroes and Puerto Ricans into New York and of the social problems facing the Metropolitan region. (This is the third volume of the New York Metropolitan Region Study, devoted to an examination of the major problems confronting the tri-state New York region.)

Javits, Jacob K. *Discrimination—U.S.A.*, New York, Harcourt, Brace and Co. 1960. Pp. 310, $4.95.

A look at the past, present, and future problems arising from racial discrimination, as related to diplomacy and the law.

Karon, Bertram P. *The Negro Personality,* New York, Springer Publishing Co. Inc., 1958. Pp. 184, $4.50.

An analysis, based on controlled testing, of the effects of American society on the personality of the Negro.

Konvitz, Milton R. *A Century of Civil Rights,* with a study of *State Law Against Discrimination* by Theodore Leskes, New York, Columbia University Press, 1961. Pp. 293, $6.00.

An historical analysis of civil rights developments during the past century. Mr. Leskes discusses the legislation enacted by states following the Supreme Court decision in the *Civil Rights Cases* of 1883.

Laponce, J. A. *The Protection of Minorities,* Berkeley and Los Angeles, University of California Press, 1960. Pp. 236, $5.00.

The ninth volume in the University of California publications in Political Science, setting forth the claims of minorities and reviewing the types of guarantees offered by treaties and constitutions and the protection found by minorities in the structures of the state, in the electoral system, and in the party system.

Litwack, Leon R. *North of Slavery,* Chicago, University of Chicago Press, and Toronto, University of Toronto Press, 1961. Pp. 318, $6.00.

A review of the status of the Negro in the free states from 1790 to 1860, suggesting that his situation then in the North is comparable to his situation now in the South.

McMillan, George. *Racial Violence and Law Enforcement,* Atlanta, Southern Regional Council, 1960. Pp. 32, 25c.

A study of passive resistance, the white citizens' council movement, and the police policy toward Negroes in the South.

Maslow, Will and Cohen, Richard. *School Segregation, Northern Style,* New York Public Affairs Committee, Inc., 1961. Pp. 20, 25c.

A report on the migration of the Negro to northern urban centers and the prevalence of segregation in those areas.

Muse, Benjamin. *Virginia's Massive Resistance,* Bloomington, Indiana University Press, 1961. Pp. 125, $3.25.

An account of Virginia's maneuvers to resist the effect of the 1954 *School Segregation Cases,* and the final acceptance of integration in that state.

Putnam, Carleton. *Race and Reason,* Washington, Public Affairs Press, 1960. Pp. 125, $3.25.

An analysis and comparison of the white and Negro races.

Race and Conscience in America, Norman, University of Oklahoma Press, 1959. Pp. 53, 50c.

A review of individual American views on the racial problem and of the projected goals that Americans should strive for in eliminating racial and minority prejudice.

Ramsey, Paul. *Christian Ethics and the Sit-In,* New York, Association Press, 1961. Pp. 128, $2.50.

A discussion of non-violent resistance, the Christian's obligation to achieve racial equality, and the norms of justice that require the individual to meet that goal.

Record, Wilson and Jane Cassels. *Little Rock, U.S.A.,* San Francisco, Chandler Publishing Co., 1960. Pp. 338, $2.25.

A selection of newspaper reports and other materials setting forth the integration situation at Central High School in Little Rock, Arkansas.

Report of the United States Commission on Civil Rights, 1960. Washington, U. S. Government Printing Office, Pp. 355.

The report of the Commission's findings in regard to segregation in public higher education.

Rose, Arnold. *The Negro in America,* Boston, Beacon Press, 1956. Pp. 324, $1.65.

A condensed version of *An American Dilemma,* published in 1944 as the final report of a comprehensive study of the American Negro problem.

Sellers, Charles Grier, Jr. *The Southerner as an American,* Chapel Hill, University of North Carolina Press, 1960. Pp. 222, $5.00.

A collection of nine essays dealing with the Americanism of Southerners from before the Civil War to date.

Stanton, William. *The Leopard's Spots,* Chicago, University of Chicago Press, 1960. Pp. 244, $4.00.

A portrayal of scientific attitudes (notably the "American School") toward race in America between 1815-1859.

Urban Native Law, Compiled by Davis, Melunsky and DuRandt, Port Elizabeth, South Africa, Grotius Publications, 1958. Pp. 1100, £ 8/8/0 (South African)

A digest of statutes, regulations, proclamations, case and common law on all aspects of the laws of South Africa affecting natives in urban areas.

Weyl, Nathaniel. *The Negro in American Civilization,* Washington, Public Affairs Press, 1960. Pp. 360, $6.00.

A presentation of the nation's efforts to resolve the Negro problem and to find a sound basis for cooperation between the two races.

Leading Articles

Berman, Daniel M. *Hugo Black, Southerner: Part II, The Negro,* 10 Am. U. L. Rev. 35-42 (1961).

A brief survey of the attitudes of Mr. Justice Black of the United States Supreme Court toward racial issues.

Bonfield, Arthur E. *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment,* 46 Cornell L. Q. 108-137 (1960).

A proposal of a statute to implement Section Two of the Fourteenth Amendment, and an analysis of previous efforts to enforce this provision of the Amendment.

Cooke, Paul. *Desegregated Education in the Middle-South Regions: Problems and Issues,* 30 Journal of Negro Education 75-79 (1961).

A statement of five current problems in school desegregation with a brief discussion of ten specific issues growing out of these problems.

Cummings, Jerold and Kane, John L., Jr. *Miscegenation, The Constitution, and Science,* 38 Dicta 24-54 (1961).

An examination of miscegenation statutes and their constitutional aspects and the scientific aspects of miscegenation.

Emerson, Thomas I. and Bonfield, Arthur E. *Forgotten Remedy for the Voteless Negro,* 192 The Nation 55-59 (January 21, 1961).

A suggestion that the Fourteenth Amendment, Section Two, be utilized to protect Negroes' voting rights.

Ervin, Richard W. *Freedom of Assembly and Racial Demonstrations,* 10 Clev-Mar. L. Rev. 88-104 (1961).

An analysis of when the right to assembly, as guaranteed by the First and Fourteenth Amendments, loses its constitutional protection.

Franklin, Mitchell. *Interposition Interposed: I,* 21 Law In Transition 1-22 (1961).

A history of interposition and its fruitless application throughout the history of the United States.

Hannah, John A. *Civil Rights—A National Challenge,* 6 S. D. L. Rev. 1-30 (1961).

An examination of the problems facing the United States in the area of civil rights, and an outline of a new program for the enforcement of civil rights.

Heyman, Michael Ira. *The Chief Justice, Racial Segregation and the Friendly Critics,* 49 Calif. L. Rev. 104-125 (1961).

An examination of the *Brown* decision and a rebuttal of the criticism of Mr. Chief Justice Warren and the rationale employed in the *School Segregation Cases.*

Horowitz, Harold W. *The 1959 California Equal Rights in "Business Establishments" Statute—A Problem in Statutory Application,* 33 So. Cal. L. Rev. 260-305 (1960).

An explanation of the new California Civil Rights Act in terms of the scope of its application.

Howell, Ronald F. *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute,* 47 Va. L. Rev. 439-467 (1961).

An analysis of the art of judicial "legislation" by means of statutory construction aided by the ascertainment of the legislative motive and purpose.

McGhee, Milton L. and Ginger, Ann Fagan. *The House I Live In: A Study of Housing for Minorities,* 46 Cornell L. Q. 194-257 (1961).

An examination and analysis of the action taken by federal, state and local governments to eliminate inadequate housing for minorities.

Miller, Loren. *The Law and Discrimination in Housing,* 20 Law. Guild Rev. 123-136 (1960).

A review of the social, historical and legal backgrounds of discrimination in housing and an analysis of the activities of the federal and state governments in the are.

Murphy, William P. *State Sovereignty and the Drafting of the Constitution,* Part I, 31 Miss. L. J. 203-262 (1960); Part II, 32 Miss. L. J. 1-23 (1961); Part III, 32 Miss. L. J. 155-172 (1961); Part IV, 32 Miss. L. J. 227-242 (1961).

A continuation of the study which began with *State Sovereignty Prior to the Constitution,* 29 Miss. L. J. 115 (1958), noted at 3 Race Rel. L. Rep. 591.

Pollak, Louis H. *The Supreme Court and the States: Reflections on Boynton v. Virginia,* 49 Calif. L. Rev. 15-55 (1961).

An analysis of the "Warren Court" and the solutions for racial problems it has presented since the *School Segregation Cases.*

Ratner, Leonard G. *Congressional Power Over The Appellate Jurisdiction of the Supreme Court,* 109 U. Pa. L. Rev. 157-202 (1960).

A history of the exercise of the congressional power to limit the jurisdiction of the Supreme Court.

Samuels, Alec. *Caucasians Only,* 4 The Lawyer 25-32 (1961).

A review of the use of racially restrictive covenants in the United States and the need of legislative action in Britain to eliminate such covenants in transfers of real property.

Schutter, Claude W. *The Segregation Cases,* 6 S. D. L. Rev. 31-53 (1961).

A summary of the thinking of the Supreme Court in regard to segregation since the decision of *Plessy v. Ferguson.*

Steamer, Robert J. *The Supreme Court and Constitutional Liberty at Mid-Century: The 1958-59 Term as a Key,* 34 Temp. L. Q. 99-123 (1961).

An extensive analysis of civil liberties cases, beginning with the Dred Scott decision.

Schwelb, Frank E. *The Sit-In Demonstration: Criminal Trespass or Constitutional Right?* 36 N.Y.U.L. Rev. 779-809 (1961).

A review of the recent sit-in demonstrations and the hypothesis that the United States Supreme Court will extend *Shelley v. Kraemer* to prevent enforcement of trespass laws applied solely because of race.

Van Alstyne, William W. *Discrimination in State University Housing Programs—Policy and Constitutional Considerations,* 13 Stan. L. Rev. 60-76 (1961).

Fourteenth Amendment considerations in relation to the housing of students off campus at state universities.

Van Alstyne, William W. *A Critique of the Ohio Public Accommodations Law,* 22 Ohio St. L. J. 201-212 (1961).

An analysis of the legislative action taken in Ohio to prevent racial discrimination, and the results of the application of those laws.

Wellington, Harry H. *The Constitution, The Labor Union, and "Governmental Action,"* 70 Yale L. J. 345-375 (1961).

An examination of the problem of whether organized labor is subject to limitations of the First and Fifth Amendments through an extension of *Railway Employees' Dept. v. Hanson,* 351 U.S. 225 (1956).

Notes

The Cemetery Lot: Rights and Restrictions, 109 U. Pa. L. Rev. 378-400 (1961).

The Civil Rights Acts and Mr. Monroe, 49 Calif. L. Rev. 145-171 (1961).

Civil Rights Act Section 1983: Abuses by Law Enforcement Officers, 36 Ind. L. J. 317-344 (1961).

Constitutional Law—Discrimination Under The Fourteenth Amendment—Expansion of the State Action Concept, 6 Vill. L. Rev. 218-231 (1960).

Constitutional Law: "Under Color of" Law and The Civil Rights Act, 1961 Duke L. J. 452-459.

Constitutionality of Discriminatory Acts of Fraternities, 8 U.C.L.A. L. Rev. 171-184 (1961).

Freedom of Association, 10 Clev-Mar. L. Rev. 104-122 (1961).

Lunch Counter Demonstrations: State Action and the Fourteenth Amendment, 47 Va. L. Rev. 105-121 (1961).

Necessity and Propriety (under 28 U.S.C. §2281) of Three-Judge Federal District Court in Suit to Enjoin Enforcement of State Statute or Administrative Order, 4 L.Ed.2d 1931-1965 (1961).

Sit-In Demonstrations: Are They Punishable in Florida? 15 U. Miami L. Rev. 123-137 (1960).

Social Psychological Data, Legislative Fact, and Constitutional Law, 29 Geo. Wash. L. Rev. 136-165 (1961).

State Involvement in Private Discrimination under the Fourteenth Amendment, 21 La. L. Rev. 433-448 (1961).

Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decisions of Federal Questions [Discusses the recent decision of Wolfe v. North Carolina, 364 U.S. 177 (1960)] 61 Colum. L. Rev. 255-277 (1961).

The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation, 74 Harv. L. Rev. 526-589 (1961).

Recent Case Comments

Boson v. Rippy, 285 F.2d 43, 5 Race Rel. L. Rep. 1048 (5th Cir. 1960) (desegregation plan for the Dallas Independent School District). 32 Miss. L. J. 307 (1961).

Boynton v. Virginia, 81 S.Ct. 182, 5 Race Rel. L. Rep. 979 (1960) (segregated facilities used by an interstate bus line). 21 La. L. Rev. 657 (1961); 12 Mercer L. Rev. 412 (1961).

Drews v. Maryland, 224 Md. 186, 167 A.2d 341 6 Race. Rel. L. Rep. 252 (1961) (criminal prosecution of Negroes for disorderly conduct for refusing to leave a private park). 7 How. L. J. 187 (1961).

Gomillion v. Lightfoot, 364, U.S. 339, 5 Race Rel. L. Rep. 974 (1960) (Alabama statute redefining the boundaries of Tuskegee, Alabama, so as to exclude eligible Negro voters from the boundaries of the municipality). 34 Temp. L. Q. 326 (1961); 21 La. L. Rev. 676 (1961); 22 Ohio St. L. J. 213 (1961).

Hannah v. Larche, 363 U.S. 420, 5 Race Rel. L. Rep. 303 (1960) (Civil Rights Commission's power to deny the right of confrontation and cross-examination at hearings held by the Commission). 10 Am. U. L. Rev. 70 (1961).

Howard Savings Inst. v. Amherst College, 66 N.J. Sup. 119, 160 A.2d 177, 5 Race Rel. L. Rep. 387 (1960) (testamentary provision establishing a scholarship loan fund for the benefit of "deserving American born, Protestant, Gentile, boys of good moral repute"). 36 Notre Dame Law. 74 (1960).

McCoy v. Greensboro City Bd. of Education, 283 F.2d 667, 5 Race Rel. L. Rep. 1027 (4th Cir. 1960) (injunction to prevent the local school board from acting on applications for reassignment to public schools on the basis of race). 47 Va. L. Rev. 514 (1961).

Myers v. State Bd. of Public Welfare, 5 Race Rel. L. Rep. 792 (Cir. Ct. of Baltimore City, 1960) (operation of segregated training schools) 20 Md. L. Rev. 375 (1960).

Progress Dev. Corp. v. Mitchell, 182 F.Supp. 681, 5 Race Rel. L. Rep. 427 (N.D. Ill. 1960) (injunction to prevent Park District from condemning plaintiff's land for the purpose of perpetuating segregated housing). 35 Notre Dame Law. 563 (1960); 70 Yale L. J. 126 (1960).

Shelton v. Tucker, 81 S.Ct. 247, 5 Race Rel. L. Rep. 965 (1960) (Arkansas statute requiring all teachers in public schools to file affidavits listing all connections with organizations). 32 Miss. L. J. 311 (1961); 7 N.Y.L.F. 212 (1961).

Slack v. Atlantic White Tower System, Inc., 181 F.Supp. 124, 5 Race Rel. L. Rep. 202 (D. Md. 1960) (restaurant's practice of segregation as state action under the Fourteenth Amendment because a state license was required for the operation of the restaurant). 6 Catholic Law. 311 (1960).

Taylor v. Board of Education, 191 F.Supp. 181, 6 Race Rel. L. Rep. 90 (1960) (retention of school district lines drawn prior to 1949 to encompass a Negro residential area and perpetuate segregation). 29 Geo. Wash. L. Rev. 786 (1961).

Wilmington Parking Authority v. Burton, 157 A.2d 894, 5 Race Rel. L. Rep. 347 (Del. 1960) (injunction against lessee's discriminatory conduct as state action because leasehold was obtained from the state). 59 Mich. L. Rev. 450 (1961).

Wolfe v. North Carolina, 364 U.S. 177, 5 Race Rel. L. Rep. 986 (1960) (failure properly to raise a federal issue in the state court as precluding review of that issue in the United States Supreme Court). 7 Wayne L. Rev. 376 (1960). Also see Note, 61 Colum. L. Rev. 255 (1961).

Anti-Discrimination Commission Reports

Federal

Fourth Report of the President's Committee on Government Employment Policy, January 18, 1961.

United States Commission on Civil Rights 1961. Reports on:

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2. Education
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5. Justice

U.S. Government Printing Office, Washington 25, D.C.

State

Maryland Commission on Interracial Problems and Relations (1960 Annual Report) January, 1961.

Massachusetts Commission Against Discrimination (1960 Annual Report).

New York Commission Against Discrimination (1960 Annual Report) March 14, 1961.

Ohio Civil Rights Commission (1960 Annual Report) August, 1960.

Ohio Civil Rights Commission Report on Discrimination in Public Accomodations in Ohio, December, 1960.

Rhode Island Commission Against Discrimination (1960 Annual Report) March 14, 1961.

City

COIR Report, City of New York, Commission on Intergroup Relations, 1961.

TABLE OF CASES
Cumulative, 1961

IN THIS LISTING, the official style of each case in the three 1961 issues appears in *italic* type. The reverse citations are in Roman type.

Table of Subsequent Disposition of Cases

The references below are to the subsequent disposition of cases in which reports of earlier proceedings were printed in the Race Relations Law Reporter, and in which no race relations factors were discussed in the later opinions here cited.

Association for the Preservation of Freedom of Choice v. Shapiro, 174 N.E.2d 487 (N.Y. Ct. of App., 1961); previous proceedings reported at 4 Race Rel L. Rep. 690 and 5 Race Rel. L. Rep. 808.

Highlander Folk School v. Tennessee, 82 S.Ct. 62; previous proceedings reported at 5 Race Rel. L. Rep. 91.

Lynn v. McElroy, 82 S.Ct. 17; previous proceedings reported at 4 Race Rel. L. Rep. 928, 5 Race Rel. L. Rep. 368.


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